APPENDIX

E. ROBERT SEAVER, CLERK

Supreme Court of the United States

~~OCTOBER~~ TERM, ~~1970~~ 1971

No. ~~5795~~ 70-5015

JON RICHARD ARGERSINGER,

Petitioner,

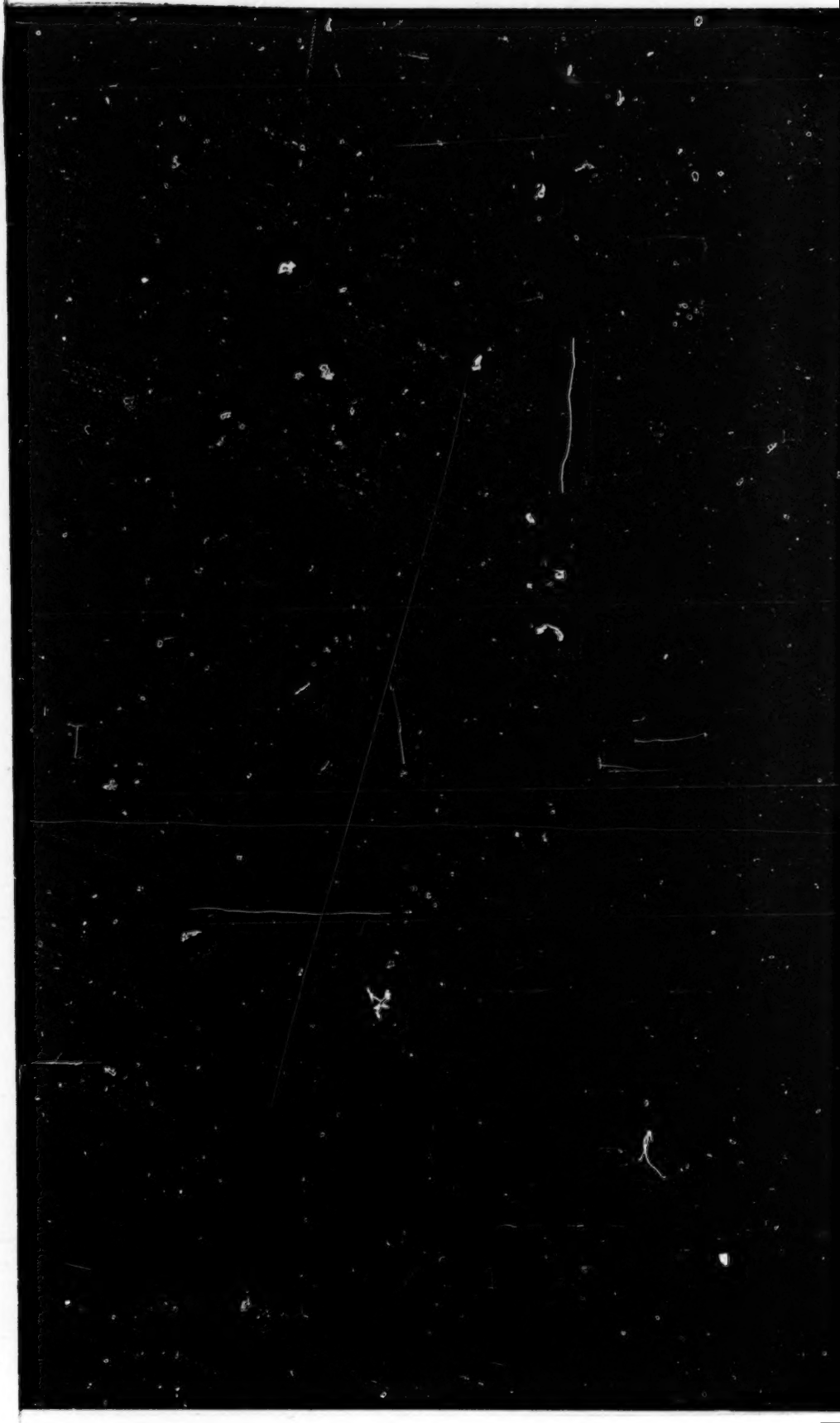
—v.—

RAYMOND HAMLIN, SHERIFF, LEON COUNTY, FLORIDA

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

PETITION FOR CERTIORARI FILED SEPTEMBER 1, 1970
CERTIORARI GRANTED FEBRUARY 22, 1971



Supreme Court of the United States

OCTOBER TERM, 1970

No. 5798

JON RICHARD ARGERSINGER,

Petitioner,

—v.—

RAYMOND HAMLIN, SHERIFF, LEON COUNTY, FLORIDA

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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IN THE SUPREME COURT OF FLORIDA

Case No:

(File Endorsement Omitted)

(Oral Argument, Monday, February 2, 1970, Five Man Court, Fifteen Minutes to the Side)

STATE OF FLORIDA, ex rel. JON RICHARD ARGERSINGER, PETITIONER

vs.

RAYMOND HAMLIN, Sheriff, Leon County, RESPONDENT

PETITION FOR WRIT OF HABEAS CORPUS—filed January 20, 1970

To the Honorable Justices of the Above Styled Court,

YOUR Petitioner, JON RICHARD ARGESINGER, by and through his undersigned attorney, bring application for a Writ of HABEAS CORPUS, pursuant to 79.01 F.S. and the Declaration of Rights, section 7, of the Florida Constitution, and on oath says:

1. He is presently incarcerated in the County Jail of Leon County, Florida, in the custody of the Respondent RAYMOND HAMLIN and is therefore restrained of his liberty.

2. Petitioner, is 19 years of age, and was at all times material to this writ, indigent and otherwise without funds to secure the services of counsel.

3. Petitioner, on January 12, 1970, was charged in the County Judge's Court of Leon, in and for Leon County, with carrying a concealed weapon, a misdemeanor under 790.01 (1) F.S., punishable by imprisonment in the county jail up to (6) six months in jail and $1,000.00 fine. On January 13, 1970, James C. Gwynn, judge of said Court, adjudged Petitioner guilty of said offense, and sentenced

Petitioner to serve 90 days in the County Jail of Leon County.

4. At the time of said adjudication and prior thereto, Petitioner, was indigent, was unrepresented by counsel, nor did he waive assistance of counsel.

5. Petitioner is now serving the above mentioned sentence, but is and was deprived of equal protection of law and his rights as secured by the Fourteenth and Sixth Amendments of the United States Constitution, and the Declaration of Rights, section 1, as of the Florida Constitution, and has no remedy save this honorable Court's intervention.

6. Petitioner verily believes now that he has good and sufficient defenses to the charges for which he stands convicted, but having been deprived of his right to counsel, was unable as an indigent layman, to properly raise and present these defenses to the trial court.

7. Petitioner is now represented by counsel, secured by friends.

WHEREFORE, Petitioner prays this Court will issue its writ commanding the Respondent Hamlin to produce the body of Petitioner before this honorable Court on a day certain, to show sufficient cause for his detention and, failing this, Petitioner Be Discharged; alternatively Petitioner prays this Court will cause the writ to be issue and set bond payable to the Governor, securing the Petitioner's appearance in Court, pending this Court's ruling on this case.

/s/ Jon Argersinger
JON RICHARD ARGERSINGER

[*Duly sworn to by Jon Richard Argersinger, jurat omitted in printing (all in italics)*]

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A.D. 1970

Tuesday, January 20, 1970

Case No. 39,309

(File Endorsement Omitted)

STATE OF FLORIDA, ex rel. JON RICHARD ARGERSINGER, PETITIONER

vs.

RAYMOND HAMLIN, Sheriff, Leon County, RESPONDENT

WRIT OF HABEAS CORPUS—January 20, 1970

In the Name and by the Authority of the State of Florida to Raymond Hamlin, Sheriff, Leon County, Greeting:

Jon Richard Argersinger has filed in this Court his Petition for Writ of Habeas Corpus charging that he is illegally detained and imprisoned by you. The Writ is granted and you are hereby commanded to make return to same instanter, showing the lawful cause and authority for the detention and imprisonment of the petitioner, and thereafter to comply with the order of this Court in the matter.

It is further ordered by the Court that this case is set down for oral argument at 9:30 o'clock a.m. Monday, February 2, 1970, on the merits, fifteen (15) minutes to the side. Pending disposition of the cause in this Court, the petitioner is committed to bail in the amount of $500, to be approved by this Court, and conditioned upon his appearance to answer further process of this Court.

DONE AND ORDERED at Tallahassee, Florida, this 20th day of January, A.D. 1970.

/s/ (Illegible)
Acting Chief Justice of the
Supreme Court of Florida

I hereby accept service of the above on behalf of the State of Florida.

/s/ R. L. Marky
Asst. Atty. General

IN THE SUPREME COURT OF FLORIDA

39,309

(File Endorsement Omitted)

STATE OF FLORIDA, ex rel. JON RICHARD ARGERSINGER, PETITIONER

vs.

RAYMOND HAMLIN, Sheriff, Leon County, RESPONDENT

RESPONSE TO WRIT OF HABEAS CORPUS—filed January 29, 1970

COMES NOW the Respondent, Raymond Hamlin, Sheriff, Leon County, Florida, by and through his undersigned attorney, pursuant to this Court's order of January 20, 1970, and files this his return thereto and says as follows:

I

Respondent admits that at the time of the issuance of the aforesaid Order Petitioner was incarcerated in the Leon County Jail under Respondent's custody and control, but that said Petitioner has since been released on bail pending a disposition of the cause herein.

II

The basis for said confinement is a Commitment Order issued by the County Judge's Court, in and for Leon County, Florida, dated January 19, 1970, a true and correct copy of which is attached hereto and made a part hereof, marked Respondent's Exhibit "A".

III

Said commitment was issued pursuant to a judgment and sentence entered against Petitioner on his guilty plea entered January 13, 1970. Petitioner was sentenced to pay a fine of $500, and in default of the payment of

such fine and costs, to be imprisoned in the county jail for a period of three months.

IV

Petitioner plead guilty to violating § 790.01(1), Fla. Stat., as amended 1969, Laws of Florida, Chapter 69-306, carrying a concealed weapon, to-wit: brass knuckles. Under said statute Petitioner was subject to ". . . imprisonment for not less than three (3) months nor exceeding six (6) months, or by fine of not less than five hundred (500) dollars nor exceeding one thousand (1,000) dollars, or by both such fine and imprisonment. . ."

V

Respondent is without knowledge as to whether Petitioner was indigent or otherwise without funds or other assets with which to secur the services of retained counsel to represent him in the County Judge's Court, and therefore denies the same.

VI

Respondent is without knowledge as to whether Petitioner verily believes he has a good and sufficient legal defense to the charge lodged against him but denies he was unable to properly raise and present these defenses to the trial court. Respondent alleges that Petitioner, through counsel, retained by his friends, said matters could have been presented by way of a Motion for New Trial under Rule 1.600, Fla. Rules of Cr. Proc.

VII

Respondent alleges Petitioner is neither ignorant or uneducated and thus unable to understand the nature of the proceedings against him. Respondent alleges to the contrary; that is, that Respondent is above average intelligence and is an articulate individual capable of understanding the nature, quality and consequences of his acts.

VIII

Respondent denies Petitioner was deprived of the equal protection of the law and his rights secured by the Fourteenth and Sixth Amendments of the United States Constitution. Respondent further denies Petitioner was denied any right guaranteed under the laws of the State of Florida and/or the Constitution thereof.

IX

Respondent affirmatively alleges that the Petitioner has not exhausted his legal remedies that presently exist, to-wit: direct appeal from the judgment and sentence to the appropriate appellate court as provided by Article V, Sec. 6(3) of the Constitution of the State of Florida, and has improperly invoked the jurisdiction of this Court.

WHEREFORE, Respondent having made response to this Court's order of January 20, 1970, respectfully moves that the Writ be discharged and Petitioner remanded to the custody of your Respondent.

Respectfully submitted,

EARL FAIRCLOTH
Attorney General

/s/ Raymond L. Marky
RAYMOND L. MARKY
Assistant Attorney General
The Capitol
Tallahassee, Florida

Counsel for the Respondent

[PROOF OF SERVICE (omitted in printing)]

EXHIBIT A

COMMITMENT TO SERVE SENTENCE

IN COUNTY JUDGE'S COURT

LEON COUNTY, STATE OF FLORIDA

Case No. 145-239A

STATE OF FLORIDA

vs.

JON ARGERSINGER

In the Name of the State of Florida, to the Sheriff or any Constable of said County:

Whereas, in this Court the DEFENDANT, ... , was, upon the 13 day of January, A.D. 1970, tried and convicted of the offense of carrying concealed weapon and,

Whereas, on the 13 day of January, A.D. 1970, he, the said DEFENDANT ....., was sentenced by this Court as follows, to-wit: to pay and forfeit to the State of Florida, for the use of Leon County, a fine in the sum of $500.00, to include costs of Court, and in default of the payment of such fine and costs to be imprisoned in the County Jail of Leon County, Florida, at hard labor, for a period of three (3) months, to begin and run from the date of this sentence.

You are therefore commanded forthwith to convey the said DEFENDANT ..... to the County Jail of said County and deliver him to the keeper thereof, who is hereby required to receive the said DEFENDANT ..... into said Jail and safely keep him until the judgment of this Court is satisfied or he be thence discharged by due course of law.

Given under my hand and seal this 19 day of January, A.D. 1970.

/s/ James E. Gwynn (Seal)
County Judge.

[Not final until time expires to file rehearing petition and, if filed, determined.]

IN THE SUPREME COURT OF FLORIDA

January Term A.D. 1970

Case No. 39,309

STATE OF FLORIDA, ex rel. JON RICHARD ARGERSINGER, PETITIONER

vs.

RAYMOND HAMLIN, Sheriff, Leon County, RESPONDENT

Opinion filed June 3, 1970

Case of original jurisdiction—Habeas Corpus
J. Michael Shea, for Petitioner

Earl Faircloth, Attorney General and Raymond L. Marky, Assistant Attorney General, for Respondent

Phillip A. Hubbart, Ronald K. Cacciatore and Roy T. Rhodes of Horne, Rhodes, Brown & Stephens for The Florida Bar; Ralph A. Marsicano, for Florida League of Municipalities; and Bruce S. Rogow, Amicus Curiae

OPINION

ROBERTS, J.

We have taken original jurisdiction of this habeas corpus proceeding to reexamine our previous decisions in *Fish* v. *State*, Fla. 1964, 159 So.2d 866, *Watkins* v. *Morris*, Fla. 1965, 179 So.2d 348, and *State ex rel. Taylor* v. *Warden*, Fla. 1967, 193 So.2d 606, holding that an indigent defendant is not entitled to court-appointed counsel when accused only of a misdemeanor. It is noteworthy that, since our decision in *Fish*, the United States Supreme Court has denied certiorari in three cases involving a denial of counsel in misdemeanor cases: *Winters* v. *Beck*, 385 U.S. 907, 87 S.Ct. 207, 17 L.Ed.2d 137 (1966); *DeJoseph* v. *Connecticut*, 385 U.S. 982, 87 S.Ct. 526, 17 L.Ed.2d 443 (1966); and *Heller* v. *Connecticut*, 389 U.S.

902, 88 S.Ct. 213, 19 L.Ed.2d 679 (1967). And we are by no means persuaded that the position we took in *Fish*, and the reasoning upon which it was based, are no longer valid.

But our conclusion in this respect does nothing to extricate the trial courts of this state from the horns of the dilemma in which they now find themselves. On the one hand is the decision of this court in *Fish* affirming a lower court which had denied a court-appointed counsel to indigent misdemeanants; and on the other hand are the Fifth Circuit federal courts—both trial and appellate —that with the aid of the Sixth and Fourteenth Amendments and the writ of habeas corpus are coercing our state courts in decisions that are as distinguished for their lack of uniformity as for their lack of sound precedent, *insofar as the applicability of Gideon* v. *Wainwright*, 372 U.S. 335, 83 St. Ct. 792, 9 L.Ed.2d 799 (1962) *to state trials of misdemeanor charges are concerned.*

In this confusing situation we feel that we have no alternative but to adopt the decision of the federal court of this judicial circuit that we feel most nearly approximates any decision in this respect that might be adopted by the Supreme Court of the United States. Assuming *arguendo* that that Court will eventually decide that *Gideon* should be extended to include misdemeanor trials, it is fair to presume that it would apply to the right-to-counsel rule the same principles applicable to a determination of the right to a jury trial, namely, that this right extends only to trials for nonpetty offenses punishable by more than six months imprisonment. See *Frank* v. *United States*, 395 U.S. 147, 89 S.Ct. 1503, 23 L.Ed.2d 162 (1969); *Duncan* v. *Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 538 (1968); *Bloom* v. *Illinois*, 381 U.S. 194, 88 S.Ct. 1477, 20 L.Ed.2d 522 (1968); and *Cleff* v. *Schnackenberg*, 384 U.S. 373, 86 S.Ct. 1523, 16 L.Ed.2d 629 (1966).

This is the standard adopted in *Brinson* v. *State*, S.D. Fla. 1967, 273 F.Supp. 840, in which the U. S. District Court, speaking through Judge Mehrtens, pointed out that "the 'absolute right' to counsel in all criminal prosecutions must be qualified by practical exigencies and, unless this

is done, the necessities of sound judicial administration would be disregarded and the administration of justice thrown into senseless chaos." Judge Mehrtens noted also that the blanket application of the rule to all misdemeanor cases "could lead to the appointment of counsel for misdemeanors not normally considered criminal, such as overparking and other petty traffic offenses, jaywalking, dropping trash upon the sidewalk, and like offenses."

To Judge Mehrtens' observations we might add that misdemeanors are usually associated with trivial offenses described as *Malum prohibitum* rather than *malum in se*, as are most felonies. Misdemeanors have none of the sanctions in addition to fine or imprisonment associated with felonies. A conviction of a felony is punished not only by imprisonment but also by the forfeiture of civil rights, such as the right to vote, to serve on a jury, and to hold public office, see *Marsh* v. *Garwood*, Fla. 1953, 65 So.2d 15, 19; and not infrequently such a conviction will prove to be an insurmountable barrier to desirable employment.

Thus, the two classes of offenses are widely separated in type, kind, punishment and effect; and even though the basic and fundamental "due process" right guaranteed by the Fourteenth Amendment must be held to include the Sixth Amendment right-to-counsel in felony cases as was held in *Gideon*, supra, it does not necessarily follow that this Sixth-Fourteenth tandem can reach down into the lowest echelons of petty offenders and hand out to them the free services of an elaborate and expensive public-defender system to defend them against charges of overparking or other petty offenses. In the words of Judge Mehrtens in *Brinson*, supra, "[t]he demands upon the bench and bar would be staggering and well-nigh impossible."

In these circumstances, and pending a definitive decision of the United States Supreme Court on the subject, we adopt the reasoning and the conclusion of the *Brinson* case, supra, and hold that an indigent defendant accused of a misdemeanor is entitled to court-appointed counsel only when the offense carries a possible penalty of more than six months imprisonment; and insofar as *Fish* and

the other cases cited above are in conflict herewith, we hereby recede therefrom.

We are indebted to learned counsel for the briefs and oral arguments presented on behalf of The Florida Bar, The Florida League of Municipalities, the Economic Opportunity Legal Services Program of Dade County, Inc., and, especially, the exhaustive briefs filed on behalf of the State of Florida—all of which have been enlightening and educative and have greatly lessened our labors.

Since it affirmatively appears in the record that the maximum term of imprisonment provided by statute for the offense charged against petitioner was six months, and that he was actually sentenced to three months, it has not been made to appear that petitioner was entitled to counsel. Accordingly, the writ heretofore issued should be and it is hereby

Discharged.

DREW, THORNAL and CARLTON, JJ., concur

BOYD, J., concurring in part and dissenting in part with Opinion

ERVIN, C.J., and ADKINS, J., concur with BOYD, J.

BOYD, J., CONCURRING IN PART, DISSENTING IN PART:

A careful examination of *Gideon* v. *Wainwright*,[1] indicates no intention of the Court to limit the right of counsel at public expense to only those indigents accused of major crimes. On the contrary the case says in part:[2]

> "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours."

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[1] 372 U.S. 335 (1962).

[2] Id. at 344.

Opinions of United States Circuit Courts of Appeal[3] extend the right of counsel to persons facing possible imprisonment regardless of the degree of their offenses or length of possible incarceration. At least seven states require counsel for all indigents charged with misdemeanors punishable by imprisonment.[4]

In *Application of Gault*,[5] the United States Supreme Court extended the right of counsel to all juveniles accused of offenses in juvenile court. If a group of indigent teen age children jointly commit a minor offense, it seems difficult to explain why the older children, who are tried as adults, will not be provided counsel at trial while their colleagues, who are a few days younger, receive counsel because they are technically juveniles.[6] Surely this is not truly equal protection of the law. In *State* v. *Steinhauer*, this Court stated:[7]

> "The right to counsel cases, such as Gideon v. Wainwright, * * * all recognized the essentiality of the assistance of counsel as a facility in the fact-finding and truth-determining process. They could be analogous to juvenile court hearings for determination of delinquency with attendant commitment to detention."

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[3] *McDonald* v. *Moore*, 353 F.2d 106 (5th CCA 1956); *Harvey* v. *State*, 340 F.2d 263 (5th CCA 1965); *Goslin* v. *Thomas*, 400 F.2d 594 (5th CCA 1968); *Boyer* v. *City of Orlando*, 402 F.2d 966 (5th CCA 1968); *James* v. *Headley*, 410 F.2d 325 (5th CCA 1969); *Bohr* v. *Purdy*, 412 F.2d 321 (5th CCA 1969); *Evans* v. *Rivers*, 126 F.2d 633 (D.C.C. 1942).

[4] *In re Johnson*, 62 Cal.2d 325, 398 P.2d 420 (1965); *People* v. *Witenski*, 15 N.Y.2d 392, 207 N.E.2d 358 (1965); *People* v. *Garret*, 43 Ill.App.2d 183, 193 N.E.2d 229 (1963); *Mulcahy* v. *Commonwealth*, 227 N.E.2d 326 (Mass.Sup.Jud.Ct. 1967); *State* v. *Borst*, 278 Minn. 388, 154 N.W.2d 888 (1967); N.H. REV.STAT.ANN. §§ 604-A:1:2 (Supp. 1967); TEX. CODE CRIM. PROC. Art. 26.04 (1966); see, Junker, *The Right to Counsel in Misdemeanor Cases*, 43 WASH.L.REV. 685, 719 (1968).

[5] 387 U.S. 1 (1967).

[6] *Application of Gault*, 387 U.S. 1 (1967); *State* v. *Steinhauer*, 216 So.2d 214 (Fla. 1968).

[7] *State* v. *Steinhauer*, 216 So.2d 214, 219 (Fla. 1968).

State Courts owe as much duty as Federal Courts to construe and protect constitutional rights.

The Sixth Amendment to the Constitution of the United States is the fount from which flows the right of counsel including rights of indigents to counsel at taxpayers' expense. The Fourteenth Amendment to the Constitution of the United States grants equal protection of the laws to all citizens. Section 2, Article 1 of the Constitution of the State of Florida provides that "all natural persons are equal before the law." Under these provisions, we must treat all citizens equally before the law. All persons accused come to the bar of justice as equals, all being presumed innocent.

Federal and State Constitutions are adopted for all of the people and must be applied uniformly. When a person is denied the exercise of constitutional rights, they are as meaningless to him as the shadow of a ghost. There is no magic yardstick by which we can determine liberty is more precious to one person than to another. From the inside all jails look alike.

The well reasoned opinion of the majority heads the Court in the right direction. It does not go far enough to meet constitutional standards of equal protection of the law. Any indigent charged with violating any state law or county or municipal ordinance punishable by a jail sentence or imprisonment for any time whatever is entitled to counsel at the expense of the prosecuting entity of government.

I concur with those provisions of the majority opinion extending benefit of counsel to indigents but dissent from the conclusion limiting right of counsel for indigents at government expense. The action of the trial court should be quashed and a new trial should be granted with benefits of counsel as is now provided for any other indigent.

ERVIN, C.J., and ADKINS, J., concur

[Petition for Rehearing covering 3 pages filed June 16, 1970 omitted from this print. It was denied, and nothing more by order July 7, 1970.]

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM A.D. 1970

Case No. 39,309

STATE OF FLORIDA, ex rel. JON RICHARD ARGERSINGER, PETITIONER

vs.

RAYMOND HAMLIN, Sheriff, Leon County, RESPONDENT

ORDER DENYING PETITION FOR REHEARING—July 7, 1970

On consideration of the Petition for Rehearing filed by Attorney for Petitioner,

IT IS ORDERED by the Court that said petition be, and the same is hereby, denied.

[Clerk's Certificate to foregoing transcript omitted in printing.]

SUPREME COURT OF THE UNITED STATES

No. 5798, October Term, 1970

JON RICHARD ARGERSINGER, PETITIONER

v.

RAYMOND HAMLIN, Sheriff, Leon County, Florida

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND GRANTING PETITION FOR WRIT OF CERTIORARI—February 22, 1971

On petition for writ of Certiorari to the Supreme Court of the State of Florida.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1971 423498 615

No. 70-5015

Brief of The National Legal Aid and Defender Association, as amicus curiae, filed April 8, 1971. NOT PRINTED.

FILED
APR 28 1971
E. ROBERT SEAVER, CLERK

No 70-5015

IN THE

Supreme Court of the United States

October Term, 1970

~~No. 5798~~

JOHN RICHARD ARGERSINGER,

Petitioner,

vs.

RAYMOND HAMLIN, Sheriff of Leon County, Florida,

Respondent.

On Writ of Certiorari to the
Supreme Court of the State of Florida

BRIEF OF
THE LEGAL AID SOCIETY OF NEW YORK,
AMICUS CURIAE

WILLIAM E. HELLERSTEIN
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New York, New York 10003
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Counsel for Amicus Curiae

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IN THE

Supreme Court of the United States

October Term, 1970

No. 5798

JOHN RICHARD ARGERSINGER,

Petitioner,

vs.

RAYMOND HAMLIN, Sheriff of Leon County, Florida,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Florida

BRIEF OF THE LEGAL AID SOCIETY OF NEW YORK, *AMICUS CURIAE*

Interest of Amicus *

The Legal Aid Society is a non-profit organization incorporated under the laws of the State of New York for the purpose of providing legal assistance to persons too poor to afford the services of legal counsel. By virtue

* Letters of Consent have been obtained from petitioner's counsel and from the Attorney General of the State of Florida and are on file with the Clerk of the Court.

of its contract with the City of New York, the Society has undertaken to serve, in essence, as the defender agency for the overwhelming majority of indigent persons charged with crime in New York City.

The Society presently employs 200 full-time attorneys in its Criminal Courts Branch and maintains a Criminal Appeals Bureau comprised of 24 full-time attorneys. Of the 189,021 criminal cases handled by the Society in 1970, 152,260 involved misdemeanor and lesser offense prosecutions. Of the 1,170 appeals prosecuted by the Criminal Appeals Bureau, 289 were appeals from convictions in the Criminal Court of the City of New York, the court having jurisdiction over misdemeanors and lesser offenses. N.Y. City Crim. Ct. Act, §31 (29A McKinney's Consol. Laws of N.Y., 1963). As in years past, these figures reflected the heavy involvement of the Society's Criminal Branch in the representation of poor people charged with lesser offenses.[1]

It is the purpose of this brief to assist petitioner in persuading the Court that the Sixth and Fourteenth Amendments must be construed to guarantee the right to

1. Under New York law, representation of indigents accused of any crime punishable by imprisonment other than a traffic infraction, is afforded on a state-wide basis. Article 18-b of the New York County Law, which establishes various plans for assigned counsel systems, defines crime for the purpose of such provision as "a felony, misdemeanor, or the breach of any law or ordinance of a political subdivision of this state, other than one that defines a 'traffic infraction' for which a sentence to a term of imprisonment is authorized upon conviction thereof." N.Y. County Law, §722-b (11 McKinney's Consol. Laws of N.Y., 1970).

The statute is consonant with the right to counsel decreed by the New York Court of Appeals. Compare, *People* v. *Witenski*, 15 N.Y. 2d 392, 207 N.E. 2d 358 (1965) with *People* v. *Letterio*, 16 N.Y. 2d 307, 213 N.E. 2d 670 (1965), cert. den. 384 U.S. 911.

counsel to all persons facing deprivation of their liberty because of an accusation of criminal conduct. In support of our constitutional argument, we will endeavor to convey to the Court what we have learned experientially from our intensive involvement over the years in the representation of indigents accused of misdemeanors and lesser offenses—an involvement which leads us to conclude that the importance of the right to counsel in such cases is as critical, and possibly more so, than in felony cases. Because we so believe, we are also concerned with the effect of an adverse ruling in petitioner's case upon the continued existence of the extensive guarantees of the assistance of counsel now provided by New York law.

Summary of Argument

The assistance of counsel in a criminal prosecution, guaranteed by the Sixth Amendment, is an indispensible condition of the right to a fair trial in our adversary system. Since *Gideon* v. *Wainwright*, 372 U.S. 335 (1963) was decided, this Court has not limited the right to counsel by virtue of the nature of the crime charged or the length of sentence that could be imposed. Nor has the Court permitted a man's poverty to serve as a basis for denial of constitutional safeguards mandated for criminal prosecutions. The extent of the Sixth Amendment's guarantee of counsel is not measurable by the extent of the right to trial by jury, either historically or functionally. This Court's decisions recognize that a trial without a jury can be fair but conclude otherwise where the right to counsel is at issue. Moreover, apart from the right to trial by jury, no other Sixth Amendment guarantee has ever been

confined to criminal prosecutions for "serious" offenses. The Court has also consistently refused to accept arguments of lack of resources by States and municipalities as grounds for limiting the meaning of the Constitution.

For many reasons, the right to counsel in "petty" offense prosecutions is as critical, if not more so, than in felony cases. The quality of justice administered at the lower criminal court level throughout the United States is far poorer than at the felony level. Inadequate facilities, procedural laxity and judicial arbitrariness are patent and widespread. Our own experience leads us to conclude that the incidence of legal error and conviction of the innocent is far more prevalent in lesser offense prosecutions than in felony cases, even when counsel is present. Also, the legal and constitutional questions involved in this class of cases are no less complex than in felony matters. Counsel's assistance is also essential to the guilty plea process which is the major mode of disposition. The collateral consequences of minor offense convictions can be serious, especially to poor persons, since they frequently affect eligibility for occupational callings and public benefits such as government housing.

In short, the notion that a fair trial can be had in the lower criminal courts without counsel is untenable and no person should be subjected to confinement, in prisons that are of the poorest quality, without a determination of guilt that has met the test of our adversary process.

ARGUMENT

The Due Process and Equal Protection Clauses of the Fourteenth Amendment and the right to counsel provision of the Sixth Amendment require that a poor person be guaranteed the assistance of counsel when charged with any crime for which he can be imprisoned.

I

At this point in our constitutional history, the signal importance of the right to counsel in criminal prosecutions is one of those few issues that can be approached with certainty. As our system is an adversary one, the right to counsel is the only means by which all other constitutional rights can be secured.[2] Thus, in *Rideau* v. *Louisiana,* 373 U. S. 723 (1963) the Court wrote:

> Under our Constitution's guarantee of due process, a person accused of committing a crime is vouchsafed basic minimal rights. Among these are the right to counsel, the right to plead not guilty, and the right to be tried in a courtroom presided over by a judge. 373 U. S. at 726-27.

With the exception of *Betts* v. *Brady,* 316 U. S. 455 (1942) and its progeny, the essentiality of counsel to the fair functioning of our system has consistently been declared by the Court—without concern for the nature or seriousness of the crime charged. *Powell* v. *Alabama,* 287 U. S. 45 (1932); *Johnson* v. *Zerbst,* 304 U. S. 450, 462 (1938); *Gideon* v. *Wainwright,* 372 U. S. 335 (1963); *Patterson* v. *Warden,* 372 U. S. 776 (1963); *In re Gault,* 387

2. Shaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev. 1, 8 (1956).

U. S. 1 (1967). Rather, the Court's many decisions extending the right to counsel signify the homage paid to Mr. Justice Sutherland's exegesis of that right in *Powell* which, because of its classic quality, bears repetition:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. 287 U. S. at 68, 69.[3]

Thus the recognition in *Gideon* that,

> * * * reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us an obvious truth. 372 U. S. at 344.

3. When it is remembered that Mr. Justice Sutherland wrote of the complexities of the "science of the law" well in advance of what has come to be known as the "Criminal Law Revolution," the prescience of his observations becomes immeasurable. Later in our brief we will attempt to show the Court how the wisdom of these observations is especially manifested in misdemeanor and lesser offense prosecutions.

Of equal significance has been the Court's consistent refusal to permit a man's poverty to serve as the basis for denying him rights otherwise available to persons accused of crime. *Griffin* v. *Illinois,* 351 U. S. 12, 19 (1956) ["There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."]; *Eskridge* v. *Washington State Board,* 357 U. S. 214 (1958); *Burns* v. *Ohio,* 360 U. S. 252 (1959); *Smith* v. *Bennett,* 365 U. S. 708 (1961); *Douglas* v. *California,* 372 U. S. 905 (1963); *Lane* v. *Brown,* 372 U. S. 477 (1963); *Seals* v. *Alabama,* 380 U. S. 254 (1965); *Long* v. *District Court,* 385 U. S. 192 (1966); *Tate* v. *Short,* —— U. S. ——, 39 U.S.L.Wk 4301 (March 2, 1971).

Of particular relevance is the recent decision in *Williams* v. *Oklahoma City,* 395 U. S. 458 (1969), in which, on equal protection grounds, the Court rejected the State's position that an indigent could be denied a free transcript of his conviction for violation of a municipal ordinance for purposes of appeal because it was a "petty offense."

The State of Florida now asks this Court to deny a poor person the right to the assistance of counsel when punishment for the crime charged would not exceed six months imprisonment. Such a result would be entirely inconsistent with the foregoing principles.

To accept Florida's position also would require a determination that the right to counsel guaranteed by the Sixth Amendment is commensurate with only one other Sixth Amendment right, that of trial by jury. There is neither historical nor constitutional basis for such an assumption, which many courts, both State and federal, have

rejected. *E.g. James* v. *Headley,* 410 F. 2d 325, 331-33 (5th Cir. 1969); *Application of Stevenson,* 458 P. 2d 414, 418 (Ore. 1969); *State* v. *Borst,* 154 N.W. 2d 888 (Minn. 1967).[4] Our own Court of Appeals, which sustained a limitation of the right to trial by jury in New York City to crimes punishable by more than one year's imprisonment,[5] much earlier held that "the right to counsel must be made meaningful and effective in criminal courts on every level." *People* v. *Witenski,* 15 N.Y. 2d 392, 395, 207 N.E. 2d 358 (1965).

Application of the Sixth Amendment's jury trial standard as the measure of the right to counsel will simply not withstand analysis. As the Fifth Circuit has pointed out,

> [b]ecause a charge is petty enough to be outside the jury-trial requirement does not mean that it is also petty enough to allow suspension of the right to counsel. The petty-offense exception has not been applied uniformly to all Sixth Amendment rights. On the contrary, In re Oliver, 1948, 333 U. S. 257, held the Sixth Amendment right to a public trial to be applicable to state proceedings although only a 60-day sentence was involved. An "accused is at the very least entitled to have his friends, relatives and counsel present, no matter with what offense he may be charged." 333 U. S. at 272. *James* v. *Headley, supra,* 410 F. 2d at 332.

In *Groppi* v. *Wisconsin,* 400 U. S. 505 (1971), the Court did not premise the right to an impartial jury on the

4. Many courts have extended the right to counsel for all misdemeanors without even considering the limitations of the jury trial provision. E.g. *Harvey* v. *Mississippi,* 340 F. 2d 263 (5th Cir. 1965). For a state by state breakdown see Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, 719-734 (1968).

5. *Matter of Hogan* v. *Rosenberg,* 24 N.Y. 2d 207, 247 N.E. 2d 260 (1969), rev'd *sub nom., Baldwin* v. *New York,* 399 U.S. 66 (1970).

seriousness of the crime charged but upon "the nature of the jury trial that the Fourteenth Amendment commands, when trial by jury is what the State has purported to accord." 400 U. S. at 508. Nor has the Court ever limited to serious offenses the other guarantees in the Sixth Amendment—to be informed of the nature of the charges, confrontation and cross-examination, and compulsory process—and we feel safe in concluding that the Court would decline to do so. See Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, 705-707 (1968).

Historically, the limitation of the right to trial by jury to non-petty offenses has an independent genealogy unrelated to the development of the right to counsel. See, *Baldwin* v. *New York, supra,* 399 U. S. 66 (1970); *Duncan* v. *Louisiana,* 391 U. S. 145, 161 (1968); Frankfurter & Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury,* 39 Harv. L. Rev. 917 (1926). No parallelism exists where the right to counsel is concerned. The right to assigned counsel actually begins with *Powell,* detours with *Betts,* and flourishes in *Gideon.* Moreover, a person who could afford to retain counsel has always been entitled to do so even though the charge be one of petty offense. *Powell* v. *Alabama, supra,* 287 U. S. at 68.

Why no such parallel can or ought be constitutionally drawn as to the right to counsel, is, that unlike the right to trial by jury, the assistance of counsel is a prerequisite to the very existence of a fair trial. This functional distinction was the very basis for the disparate treatment afforded the right to jury trial from the right to counsel when problems of retroactivity arose. In limiting the application of *Duncan,* the Court refused to assume that a trial before

a judge, rather than a jury, could not have been fair, and concluded, therefore, that the absence of a jury did not diminish the efficacy of the fact-finding process. *DeStefano* v. *Woods,* 392 U. S. 631 (1968). However, *Gideon* was deemed retroactive because of the Court's belief that the absence of counsel did affect the integrity of the guilt-determining process. *Pickelsimer* v. *Wainwright,* 375 U. S. 2 (1963); *Johnson* v. *New Jersey,* 384 U. S. 719, 727-28 (1966); *Arsenault* v. *Massachusetts,* 393 U. S. 5 (1968); *McConnell* v. *Rhay,* 393 U. S. 2 (1968); *Williams* v. *United States,* —— U. S. ——, 9 Cr. L. Rep. 3015, 3017 (April 7, 1971).

That the presence of counsel is part and parcel of a fair trial is also manifested in the Court's persistent refusal to search the record of a trial for prejudice, once the right to counsel is shown to have been violated. *Glasser* v. *United States,* 315 U. S. 60, 75, 76 (1942); *Chandler* v. *Fretag,* 348 U. S. 3 (1954); *Reynolds* v. *Cochran,* 365 U. S. 525, 531 (1961); *Chewning* v. *Cunningham,* 368 U. S. 443, 447 (1962); *White* v. *Maryland,* 373 U. S. 59 (1963); *United States* v. *Wade,* 388 U. S. 218, 236 (1967); *Chapman* v. *California,* 386 U. S. 18, 23 (1967); but see, *Chambers* v. *Maroney,* 399 U. S. 42, 53-54 (1970).

Florida's position, devoid as it is of constitutional strength, thus rests solely on an argument of expedience, such as that propounded by the majority below—that the Constitution does not compel the State to "hand out to them [the lowest echelons of petty offenders] the free services of an elaborate and expensive public defendant system. * * *" 236 So. 2d at 444.

In securing to all persons rights guaranteed by the Constitution however, the Court has rejected at every turn,

arguments that have urged limitations *in the definition* of constitutional rights based upon assertions of unavailable resources by the States. *Griffin* v. *Illinois, supra,* 351 U. S. 12; *Gideon* v. *Wainwright, supra,* 372 U. S. 335; *Douglas* v. *California, supra,* 372 U. S. 353; *Baldwin* v. *New York, supra,* 399 U. S. 66; *Shapiro* v. *Thompson,* 394 U. S. 618, 633 (1969); *Boddie* v. *Connecticut,* —— U. S. ——, 39 U.S.L.Wk 4294 (March 2, 1971).

In short, the meaning of the Sixth Amendment and Due Process Clause does not fluctuate in proportion to the number of persons who seek otherwise justifiable refuge in them. The rights afforded by the Constitution are personal rights "which the State must respect, the benefit of which every person may demand. * * * [I]ts safeguards extend to all." *Hill* v. *Texas,* 316 U. S. 400, 406 (1942).[6]

II

Extending the right to counsel to all misdemeanor convictions, the Minnesota Supreme Court observed that

> [a] defendant in court on a charge defined as a misdemeanor is as helpless to defend himself as he would be if he were charged with a gross misdemeanor or felony. *State* v. *Borst, supra,* 154 N.W. 2d at 893.

6. We are, of course, puzzled and concerned about the thrust of that portion of the Court's recent order prescribing rules for the trial of minor offenses before federal magistrates insofar as those rules are subject to an interpretation that a poor person charged with a petty offense other than a minor offense need not be informed of a right to assigned counsel. *Order Prescribing Rules of Procedure For the Trial of Minor Offenses Before Magistrates,* Rule 3(b), 400 U.S. 1037-42 (Jan. 27, 1971). We must assume, however, that the Court has not conclusively determined that such an interpretation and limitation of the right to counsel is constitutional. 400 U.S. 1031-36 (statement of Mr. Justice Black).

That this pronouncement may, indeed, commit only the error of understatement can easily be seen from an appreciation of the workings of the criminal process in the lower criminal courts, for it is the unsatisfactory nature of that process that increases, rather than detracts from, the need for counsel's presence whenever desired by the accused, rich or poor.[7]

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7. Our discussion of the problem of the lower courts will, at times, involve courts which have jurisdiction to try cases punishable by more than six months imprisonment, as does the Criminal Court of the City of New York. This suggests at the outset that the concept of "petty" offense on a nationwide level is a totally unworkable one, for it assumes a tolerably certain and stable definition based on historical notions that offenses punishable by no more than six months imprisonment involve matters of "small importance," "trifling nuisances" of a regulatory nature—*mala prohibita* rather than *mala in se*. 1 Stephen, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 123 (1883); *Callan* v. *Wilson*, 127 U.S. 540, 553 (1888); *Shick* v. *United States*, 195 U.S. 65, 69 (1904); *United States* v. *Barnett*, 376 U.S. 681, 748-750 (Mr. Justice Goldberg, dissenting); *Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966). Throughout the country, however, categories of offenses classified as misdemeanors and felonies vary and an offense which is a felony or serious misdemeanor in one state may be a lesser offense in another. See, President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS 30 (1967); *District of Columbia* v. *Colts*, 282 U.S. 63 (1930).

Modern penal law revisions also have not retained common law concepts and have attached lesser sentences to crimes punished much more seriously at common law. For example, New York law, recently revised, has no six month sentence for any crime and punishes class A misdemeanors by one years imprisonment and class B misdemeanors by three months imprisonment. In the class B category, however, are crimes such as conspiracy in the fourth degree [P.L. §105.00], menacing [P.L. §120.15], sexual abuse in the third degree [P.L. §130.55], criminal tampering in the second degree [P.L. §145.15], reckless endangerment of property [P.L. §145.25], commercial bribery and bribe-receiving [P.L. §§180.00, 180.05]. Even violations, punishable by only 15 days imprisonment include such crimes as harassment [P.L. §240.25] and criminal solicitation in the third degree [P.L. §100.00]. These are crimes which of course do not fall into the *malum prohibitum* genre and demonstrate that a constitutional limitation on the right to counsel based on the "petty offense" concept would bear little relation to any historical understanding of the term. See *Callan* v. *Wilson*, *supra*, 127 U.S. at 556.

A tragic truth about the lower criminal courts throughout the United States, especially in urban areas, is the degree to which ineptitude, chaos and patent unfairness has become rampant.

In 1967, the President's Commission on Law Enforcement and the Administration of Justice expressed its shock at what it had observed in these courts and it called attention to the "cramped and noisy courtrooms, undignified and perfunctory procedures and badly trained personnel" which were representative.[8]

The Commission also spoke of "assembly-line justice"[9] and trial procedures that bore little resemblance to those usually associated with due process, characterized by an informality that would not be tolerated in a felony trial.[10]

The Commission further pointed out that the extremely poor quality of justice in the lower courts was not a recent phenomenon but that "[s]tudy commissions have pointed out the scandal of the lower criminal courts for over a century."[11]

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8. President's Commission on Law Enforcement and the Administration of Justice, THE CHALLENGE OF CRIME IN A FREE SOCIETY 128 (1967). Only recently, a judge of the New York City Criminal Court tendered his resignation because of these conditions, *N.Y. Times*, April 13, 1971, p. 44.

9. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra*, n. 8 at 127-128.

10. President's Commission on Law Enforcement and the Administration of Justice, TASK FORCE REPORT: THE COURTS, *supra*, n. 7 at 30.

11. THE CHALLENGE OF CRIME IN A FREE SOCIETY, *supra*, n. 8 at 129.

Although the vast majority of Americans have contact with the criminal process only at the lower criminal court level,[12] the quality of the judiciary is exceptionally low. That a substantial portion of municipal court judges are chosen neither for their legal talent nor their compassion but for their service to local political machines is well-known.[13]

The author of a recent study has stated:

> If my sampling is a fair indication (I simply sat down in courtrooms selected at random around the country and listened) perhaps half of the trial judges are, for one reason or another, unfit to sit on the bench.
>
> * * *
>
> [I]n states like Pennsylvania, New York, Kentucky, Texas, Oklahoma, and Indiana where court problems are especially acute (lawyers, prosecutors, policemen and judges) complain that my estimate of the percentage of incompetent judges is far too low.
>
> James, CRISIS IN THE COURTS 4 (1968)

In describing the manner in which "petty offenses" are handled in these courts, the Commission's Task Force found that,

> Judges sometimes seem annoyed at being required to preside in these courts. Defendants are treated with contempt, berated and laughed at, embarrassed, and sentenced to serve their time or work off their fines. Observers have sometimes reported difficulty in determining what offense is being tried in a given

12. Note: *Metropolitan Criminal Courts of First Instance,* 70 Harv. L. Rev. 320 (1956).

13. Katz, *Municipal Courts—Another Urban Ill,* 20 Case West L. Rev. 87, 121 (1968).

case and instances have come to light in which the disposition bears little relationship to the original charge. A trial of a defendant charged by police with drunkenness consisted of this exchange:

> MAGISTRATE: "Where do you live?"
> DEFENDANT: "Norfolk."
> MAGISTRATE: "What are you doing in Philadelphia?"
> DEFENDANT: "Well, I didn't have any work down there, so I came up here to see if I could find * * *"
> MAGISTRATE (who had been shaking his head): "That story's not good enough for me. I'm going to have you investigated. You're a vagrant. Three months in the House of Correction."

TASK FORCE REPORT: THE COURTS, *supra,* at 31.

Even when judges are well trained[14] and/or well-intentioned, the demands placed upon them by persistently heavy caseloads and inadequate auxiliary resources create the threat of their becoming case-hardened and ill-tempered. A student of the New York City Criminal Court thus has written that,

> Lawyers and others who observe Criminal Court say that many judges become cynical, bored or weary after years on the bench, that some of them demean rather than uplift the dignity of the proceedings, that many use bail as a punitive weapon and that a decision may depend less on the merits of the case than on the judge's mood, his opinion of the lawyers involved or the idiosyncrasies of his personality.

Kessler, *Judging the Judges,* The Wall Street Journal, Dec. 7, 1967, p. 1, col. 1.

14. In some states, such as North Dakota, a municipal judge in some instances need not have any legal training at all. N.D. Cent. Code §40-18-01 (1968) [In cities under 3,000 persons no training required and if attorney is unavailable in cities of more than 3,000, then layman may act as a municipal judge].

In 1970, the Legal Aid Society was assigned to 164,461 misdemeanor and lesser offense cases. Of this number, 29,824 were dismissed, 1,593 were transferred to Family Court,[15] and 38,386 resulted in pleas of guilty. Trials were held in 3,100 cases, with 1,400 acquittals and 1,700 convictions.[16]

By contrast, in 1970, the Society was assigned to 12,301 felony cases of which 530 were dismissed and 15 transferred to Family Court. Pleas of guilty were entered in 5,709 cases. Trials were held in 138 cases with 88 convictions and 50 acquittals.[17]

At the outset, these figures indicate that when an urban defender agency does not close its doors to persons charged with less serious offenses, it is called upon to render its greatest service in that area. That such an allocation of legal resources is warranted is observable from the next conclusion our figures entitle us to draw: that an over-

15. Under New York law, the Family Court has original jurisdiction over various criminal acts "between spouses or between parent and child or between members of the same family or household." N.Y. Fam. Ct. Act, §812 (29A McKinney's Consol. Laws of N.Y. 1963). The meaning of the section has been the subject of considerable litigation. *E.g. People* v. *Williams,* 24 N.Y. 2d 274, 248 N.E. 2d 8 (1969); *People* v. *Johnson,* 20 N.Y. 2d 220, 229 N.E. 2d 180 (1967). Many of the criminal acts which would divest the Criminal Court of jurisdiction are punishable by less than six months imprisonment. The technical complexity of the statute amply demonstrates the need for counsel so as to avoid an unwarranted application of the criminal process to a family dispute.

16. 35,166 cases were disposed of in miscellaneous fashion and do not here concern us since they did not deal with the merits of the charges; *i.e.,* cases in which the Society was relieved of its initial assignment or where pleas were entered under other charges.

17. 3,891 cases were disposed of in miscellaneous fashion. See n. 16 above.

whelmingly greater proportion of persons charged with less serious offenses [45%] either have their cases dismissed or are acquitted than is the case with felony prosecutions [9%]. Thus we know that the prevalence of legal insufficiency and outright innocence is far greater in the lesser offense category.[18]

With respect to cases which resulted in conviction, our figures comparing our results on appeal in lesser offense cases with felony convictions for the years 1969 and 1970 also tell us much about the lesser offense process:

	1969	*1970*
Appeals to Appellate Divisions resulting in decision (felony)	412	481
Affirmed	376	430
Reversed or modified	36	51
Percent reversed or modified	9%	11%

* * *

	1969	*1970*
Appeals to Appellate Terms resulting in decision (misdemeanor and violation)	187	228
Affirmed	107	149
Reversed or modified	80	79
Percent reversed or modified	42%	35%

18. Our figures, of course, do not indicate what the results would be in a system where counsel was not furnished. As New York has long afforded counsel to lesser offenders except for traffic infractions [see n. 1 *supra*], we have no way of making a comparative analysis. For the Court's interest, however, we are annexing as Appendix A, a study made by the American Civil Liberties Union of Nevada which does offer some comparative analysis of defended *vis a vis* undefended cases—the subject of the study being the Police Court in Reno, Nevada.

It is evident therefore, that the incidence of reversal on appeal from a misdemeanor or violation conviction is far greater than in felony cases, signifying that (1) the occurrence of legal error in the trial of a lesser offense is far more frequent than in a felony trial; (2) the chances of imprisonment based upon legal error is three to four times as great in lesser offense prosecution; (3) the chance that an innocent person will be convicted in the lower court far exceeds that in a felony case. [In not one of the 87 Appellate Division reversals above, was the ground for reversal the failure of the People to prove the defendant's guilt beyond a reasonable doubt. Of the Appellate Term reversals over the two years, approximately 40% were on the ground that the prosecution failed to establish guilt beyond a reasonable doubt.]; (4) as each defendant was represented by counsel, the ground for reversal was often protected, thereby signifying the critical role of counsel.[19]

Our experience with lesser offense prosecution enables us to make a number of other observations about the criminal court process that renders the need for counsel imperative.

The majority of the defendants in the lower criminal courts are the urban poor and mainly of minority extraction. In New York, the minority groups most heavily involved

19. Even where specific objection was not made, cross-examination of the People's witnesses developed the record so as to enable counsel to advance grounds for reversal for the first time on appeal. New York law is liberal on this aspect of its practice. Code Crim. Proc. §520; *People* v. *McLucas,* 15 N.Y. 2d 167, 204 N.E. 2d 846 (1965); *People* v. *Arthur,* 22 N.Y. 2d 325 239 N.E. 2d 537 (1968). Of course, the importance of counsel on appeal in less serious offenses is an independent issue and we would respectfully urge the relevance of our appeals data to the issue presented in *Mayer* v. *City of Chicago,* Oct. Term, 1970, No. 6061, prob. juris. noted, Feb. 22, 1971.

are, of course, those of black and Puerto Rican heritage. The Criminal Court thus plays a very large part in the lives of many of the urban poor, and even with counsel guaranteed by New York law, the belief is widespread among the impoverished and minority group residents of the City's ghettos who enter the courtrooms of the Criminal Court either as defendants or as relatives and friends of defendants, that justice is dispensed on an assembly-line basis.[20] We doubt that the perpetuation throughout the country of systems where not even counsel is present can be a step towards improving this unsatisfactory state of affairs.

A sampling of the appeals which the Criminal Appeals Bureau handled during the past two years also points up various aspects of the lesser offense process which render Mr. Justice Sutherland's appraisal of the role of counsel especially applicable to this category of cases.

1. Many of the crimes prosecuted are of the "low visibility" variety—police crimes such as loitering, vagrancy and disorderly conduct, which, by their very nature, are replete with serious legal issues ranging from the sufficiency of the evidence to the constitutionality of the statute involved.[21]

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20. See, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 337 (Bantam Ed. 1968); Wright, *The Courts Have Failed the Poor,* N.Y. Times [Magazine] March 9, 1969, p. 100.

21. See, Douglas, *Vagrancy and Arrest on Suspicion,* 70 Yale L.J. 1 (1960); Foote, *Vagrancy-Type Law and its Administration,* 104 U. Pa. L. Rev. 603 (1956); Amsterdam, *Federal Constitutional Restrictions on the Punishment of Crimes of Status, Crimes of General Obnoxiousness, Crimes of Displeasing Police Officers, and the Like,* 3 Crim. L. Bull. 205 (1968); see also, *Coates* v. *City of Cincinnati,* No. 1370, October Term, 1969.

In *Sibron* v. *New York,* 392 U. S. 40 (1968), the Court specifically adverted to this aspect of the criminal process:

> Many deep and abiding constitutional problems are encountered primarily at a level of "low visibility" in the criminal process—in the context of prosecutions for minor offenses which carry only short sentences. We do not believe that the Constitution contemplates that people deprived of constitutional rights at this level should be left utterly remediless and defenseless against repetitions of unconstitutional conduct. 392 U. S. at 53.

Accordingly, many reversals have been obtained because of the fertile ground provided in these cases for legal error.[22] And on numerous occasions, constitutional challenges to the statutes themselves have been made by trial

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22. In *People* v. *Peters,* New York Law Journal, Jan. 7, 1971, p. 2, col. 1 (App. Term, 1st Dept.), the court reversed a conviction for public lewdness, a class B misdemeanor [P.L. §245.00] on the ground that proof of guilt was not established beyond a reasonable doubt. The function performed by trial counsel was critical because the reversal was based upon inconsistencies between the arresting officer's testimony at trial and his entries on his arrest card which were brought out on cross-examination.

In *People* v. *Schwartz,* New York Law Journal, Dec. 17, 1970, p. 2, col. 1 (App. Term, 1st Dept.), a conviction for disorderly conduct [P.L. §240.20] was reversed because the People failed to prove that defendant's conduct was sufficient to establish a risk of public inconvenience or harm. Here, the defendant had originally pleaded guilty without counsel, which plea was vacated by counsel immediately upon his assignment.

In *People* v. *Heins,* New York Law Journal, Oct. 26, 1970, p. 2, col. 3 (App. Term 1st Dept.) the defendant's loitering conviction was overturned, the court finding that his lingering in a restroom was neither unduly long, nor tainted with conduct indicative of prohibited activity. The defendant had been reading a newspaper while awaiting his turn to use the toilet.

In *People* v. *Brown,* New York Law Journal, Oct. 10, 1969, p. 2, col. 4 (App. Term, 1st Dept.), another loitering conviction was

and/or appellate counsel [23] This Court, of course, has had its own opportunities to observe, at close hand, the manner in which statutes of this kind are utilized. See, *Thompson* v. *City of Louisville*, 362 U. S. 199 (1960); *Garner* v. *Louisiana*, 368 U. S. 157 (1961); *Taylor* v. *Louisiana*, 370 U. S. 154 (1962); *Fields* v. *City of Fairfield*, 375 U. S. 218 (1963); *Barr* v. *City of Columbia*, 378 U. S. 146 (1964); *Shuttlesworth* v. *City of Birmingham*, 382 U. S. 87 (1965).

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overturned with a holding that "no law brands one as a loiterer who enters a subway station and fails to take the first train to his destination * * *."

In *People* v. *McCaskill*, New York Law Journal, June 26, 1970, p. 2, col. 3 (App. Term, 1st Dept.), a conviction for obstructing vehicular traffic was reversed [P.L. §240.20(5)] where the defendant, while crossing the street was brushed by a car driven by a plain-clothes detective who did not take kindly to the surprise and anger expressed by the defendant. At trial, counsel was able to establish that this had been the basis for the filing of the complaint.

23. In *People* v. *Beltrand*, 63 Misc. 2d 1041, 314 N.Y.S. 2d 276 (Crim. Ct. N.Y. Co. 1970) trial counsel challenged the constitutionality of a section of New York's loitering statute [P.L. §240.35 (6)] which makes it a crime to "loiter * * * in or about a place without apparent reason and under circumstances which justify suspicion that he may be engaged or about to engage in crime." The trial court declared the statute unconstitutional. An appeal by the Attorney General is pending.

In *People* v. *Harris*, 64 Misc. 2d 510, 315 N.Y.S. 2d 66 (App. Term, 1st Dept., 1969) a challenge to New York's fraudulent accosting statute [P.L. §165.30] was sustained. See, also, *Fenster* v. *Leary*, 20 N.Y. 2d 309, 229 N.E. 2d 419 (1967) [New York's vagrancy statute held unconstitutional]; but see, *People* v. *Pagnotta*, 25 N.Y. 2d 333, N.E. 2d 202 (1970) sustaining the constitutionality of New York's former loitering for the purpose of using narcotics statute. However, on November 2, 1970, the five New York City District Attorneys told the Police Department that a vast majority of the arrests made under the successor statute [P.L. §240.36] have been "unwarranted and unlawful." The New York County District Attorney's office dismissed 89 per cent of 1,802 narcotic loitering arrests in three months. *N.Y. Times*, Nov. 2, 1970, p. 49, col. 6.

2. Apart from the fact that in many lesser offense prosecutions the defendant is actually innocent, it is also true that most frequently the court has before it a person who is not a hardened criminal. The defendant might be a person who became involved in a little neighborhood scuffle, or looked a little slovenly in a subway station, or picked a garment from a department store counter intending to pay for it on another floor.[24] It is to these persons that the criminal court process can be most traumatic and disruptive. See, Hellerstein, *The Importance of the Misdemeanor Case on Trial and Appeal,* 38 Legal Aid Briefcase 151, 153 (1970).

3. In many cases, procedural and substantive complexities are as prevalent as in felony cases. This is especially true in lesser sex offense cases, cases with difficult problems of statutory construction, and all cases where the

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24. Again several of our recent cases are representative. In *People* v. *Markowitz,* 18 N.Y. 2d 953, 223 N.E. 2d 572 (1966), the defendant, without counsel, was convicted of selling scorecards in front of Yankee Stadium without a license and fined $6.00. Assigned to the appeal, our office pointed out that the defendant had actually applied for a license but had been told that he didn't need one because he was selling printed matter and urged that it was improper to convict a person who makes a bona fide attempt to comply with the law. The Court of Appeals reversed unanimously on due process grounds citing the decision of this Court in *Cox* v. *Louisiana,* 379 U.S. 559 (1965).

In *People* v. *Williams,* New York Law Journal, April 18, 1968, p. 2, col. 2 (App. Term, 1st Dept.), the defendant was convicted for loitering in a subway station. He testified that he had been pulled from a telephone booth after placing a call to his employer. In rebuttal, the officer testified that there was no phone booth on that platform. On appeal, counsel obtained certification from the Transit Authority that indeed there were two phone booths at the station. The conviction was reversed.

legality of police conduct pertaining to searches and seizures or confessions is involved.[25]

4. In many instances, the People's case is based upon perjured police testimony and counsel has a significant role in protecting the defendant against its use. This is particularly true of minor narcotic prosecutions, where to c..-

25. In *People* v. *Hanna*, New York Law Journal, July 19, 1968 (App. Term, 2d & 11th Jud. Dist.), a conviction for sexual abuse in the third degree, a class B misdemeanor [P.L. §130.55] was reversed because the complainant testified to an uncorroborated rape. The record was protected by trial counsel's timely motion for dismissal for lack of corroboration. Similar results were reached in *People* v. *Tolliver*, New York Law Journal, June 17, 1970, p. 2. col. 5 (App. Term, 1st Dept.) and *People* v. *Soto*, New York Law Journal, Nov. 3, 1969, p. 2. col. 1 (App. Term, 1st Dept.). That an unrepresented defendant would have known of this complex aspect of the law is highly dubious.

In *People* v. *Salgado*, New York Law Journal, April 6, 1970, p. 2, col. 2 (App. Term, 1st Dept.), a conviction for endangering the welfare of a minor was reversed because guilt had not been established beyond a reasonable doubt, the court pointing out that the People's case rested upon the uncorroborated testimony of a minor.

With respect to issues of illegal search and seizure, no case is more representative than *Sibron* v. *New York*, 392 U.S. 40 (1968). an appeal which involved a New York City Criminal Court conviction for possession of narcotics. Indeed, it was in *Sibron* that the Court also noted the seriousness of a misdemeanor conviction with respect to the question of mootness. 392 U.S. at 56. See also, *People* v. *White*, 16 N.Y. 2d 270, 213 N.E. 2d 438 (1965), cert. den. 386 U.S. 1008 (Warren, Douglas, Fortas of the op. cert. should be granted). Of course, many cases in the Criminal Court continue to present either new Fourth Amendment issues [*e.g. People* v. *Whitehurst*, 25 N.Y. 2d 389, 254 N.E. 2d 905 (1969); *People* v. *Anderson*, 24 N.Y. 2d 12, 246 N.E. 2d 508 (1969); *People* v. *Rosemond*, 26 N.Y. 2d 101, 257 N.E. 2d 23 (1970); *People* v. *Butterly*, 25 N.Y. 2d 159, 250 N.E. 2d 340 (1969)] or instances where trial judges refuse to comply with appellate court decisions. *People* v. *Delgado*, New York Law Journal, Dec. 17, 1970, p. 2, col. 1 (App. Term, 1st Dept.) is of particular relevance because it is another example wherein trial counsel was instrumental in laying the ground for reversal when he renewed a motion to suppress at trial after it became clear that the police officer had given different testimony on the issue of abandonment at the suppression hearing.

cumvent this Court's decision in *Mapp* v. *Ohio,* 367 U.S. 643 (1961), police officers have resorted to what has come to be known as "dropsy" testimony—statements to the effect that upon the officer's approach, the defendant dropped narcotics to the ground, constituting an abandonment and thereby giving the officer probable cause to arrest him.[26]

5. Counsel is also integral to any process which relies heavily upon the entry of guilty pleas. *Evans* v. *Rives,* 126 F. 2d 633, 637 (D.C. Cir. 1942) As our own figures demonstrate, the overwhelming number of convictions in the lesser offense area as well as in felony cases are secured through guilty pleas. As long as our system depends upon this manner of disposition to avoid even greater calendar-clogging, the guiding hand of counsel is essential. *Kercheval* v. *United States,* 274 U.S. 220, 223 (1927); *Boykin* v. *Alabama,* 395 U.S. 238 (1969). It is counsel who provides expert evaluation of the appropriateness of the guilty plea and assistance to the defendant in obtaining charge and sentence leniency by plea negotiation. Counsel's skills are as important in plea negotiation as they are at trial. Newman, CONVICTION, 198 (1966). Indeed, counsel's involvement in the plea process has frequently permitted a Court to feel secure in the belief that a plea had properly

26. Presently pending before the New York Court of Appeals are a series of appeals prosecuted by the Society's Appeals Bureau in which the court is asked to shift to the People the burden of proof at a suppression hearing where they rely on "dropsy" testimony. The District Attorney for New York County has conceded that perjury is blatant in these types of cases, as well as others and has joined in our request for relief. *People* v. *Berrios* (argued before the New York Court of Appeals on March 2, 1971). See Barlow, *Patterns of Arrests for Misdemeanor Narcotics Possession: Manhattan Police Practices,* 1960-62, 4 Crim. L. Bull. 549 (1968); *Police Practices in Narcotics Cases,* 4 Colum. J. Law & Soc. Prob. 87 (1968).

been entered. Compare, *People* v. *Nixon,* 21 N.Y. 2d 338, 234 N.E. 2d 687, cert. den. *sub nom., Robinson* v. *New York,* 393 U.S. 1067 with *People* v. *Seaton,* 19 N.Y. 2d 404, 227 N.E. 2d 294 (1967); see *McMann* v. *Richardson,* 397 U.S. 759, 771 (1970).

There are, no doubt, still additional reasons why counsel should not be denied an indigent facing a charge punishable by imprisonment and the factors discussed in this brief should not be deemed exhaustive. For example, the collateral consequences of lesser offenses are frequently as severe to a poor person as are those which attend a conviction for felony since they affect a person's qualifications for various occupational callings and eligibility for public housing. See Appellant's Brief, *Baldwin* v. *New York, supra,* 399 U.S. 66, pp. 26-28, Appendix C, pp. C-1-C-6. As one federal court has recently also observed, "[a]ny incarceration of over thirty days, more or less, will usually result in loss of employment, with a consequent substantial detriment to the defendant and his family." *Marston* v. *Oliver,* —— F. Supp. —— (E.D. Va. 3/10/71) 8 Cr. L. Rep. 2457-8.

The need for counsel's assistance to secure release on bail pending appeal is also critical, especially in view of the high percentage of reversals that is obtainable upon appeals in these types of cases.

In sum, the key issue is whether, given the hard facts about the lower criminal courts in our country, with their poor processes and high incidence of miscarriage of justice, this Court can still feel assured that without counsel, the fairness of the trial process, which is the matrix of our

entire system, will, nonetheless, be secured to the indigent. For the reasons stated above, we think this is impossible and thus, that no man should be condemned to prison[27] for as long as six months without a fair trial, for which the assistance of counsel is an indispensable precondition.

Conclusion

It is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

WILLIAM E. HELLERSTEIN
The Legal Aid Society
Counsel for Amicus Curiae

27. Another fact of life at this level is the atrocious conditions that exist in County and Municipal Jails where most lesser sentences are served. See, Note, *Constitutional Limitations in the Conditions of Pretrial Detention,* 79 Yale L.J. 941, 943-47 (1970); *Jones* v. *Wittenberg,* mem. op. #C70-388 (N.D. Ohio, 1971).

Appendix A

American Civil Liberties Union Study Comparing Defended vs. Undefended Cases in Police Court, Reno, Nevada

A Preliminary Report

LEGAL COUNSEL FOR MISDEMEANANTS

A Comparison of Defended vs. Undefended Cases in Police Court

Reno, Nevada October-December 1970

A Study by the
American Civil Liberties Union of Nevada

Misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel.

This finding emerged from a 10-week observation of proceedings in the Reno Municipal Court from October into December 1970. An extensive analysis of the several thousand hearings and trials will be completed later in 1971. In the meantime a preliminary comparison of defended vs. undefended cases is presented here.

In order to make valid comparisons, each person with a defense attorney was matched with undefended cases of like sex, age and race who faced the same charges. Special characteristics such as beards or long hair were also taken into account in the matching process whenever possible.

Of the 72 cases who had legal counsel which reached conclusion during the observation period, 50 involved one charge, nine persons had two charges against them, and 13 faced three or more charges. Matching cases were not only equated for type of charge but also for the number of charges.

Nontraffic Charges

Misdemeanors in the nontraffic category include such charges as public intoxication, vagrancy, disorderly person, disturbing the peace, resisting arrest, interfering with an officer, assault and battery, obscene language, contributing to the delinquency of a minor, petty theft and the like.

Chief finding was that 46 percent of the people who had lawyers, but only five percent of the undefended comparable nontraffic cases were dismissed, or a favorable ratio for defended cases of 9-to-1. (Table 1)

Traffic Charges

Having a lawyer in court made less difference to the client in the disposition of traffic cases. All defendants were considerably more likely to be given an immediate penalty for traffic violations. Defended persons were twice as likely as undefended to have all charges dismissed. (Table 2)

Percent given immediate penalties in traffic and nontraffic cases are compared below for the defended and the undefended:

	Percent Given Immediate Penalty	
	Traffic Charges	*Nontraffic Charges*
Defended cases	62%	37%
Undefended cases	84	57

Pleas

Guilty pleas were made by only four percent represented by counsel in contrast to 68 percent among those without attorneys. (Table 3)

Twenty-eight percent of the pleas entered through attorneys were changed from not guilty to guilty compared with only eight percent of those undefended, perhaps evidence of greater plea bargaining by counsel.

One-third of the defended charges compared to three-quarters of the undefended eventually resulted in guilty pleas.

But even when like pleas are compared, it pays a defendant to have an attorney in court. Not only did attorneys present more non-guilty pleas, but got more of them dismissed. Of all the not-guilty pleas, 71 percent of the defended, but only 37 percent without counsel resulted in the charges being dismissed. (Table 4)

SUMMARY

The following figures summarize the effects of legal representation on the disposition of all types of misdemeanor cases in this police court:

Charges were:	*Attorney Defended Cases*	*Comparable Undefended Cases*
Dismissed	35%	7%
No immediate penalty	15	29
Immediate penalty	50	64
Total percent	100%	100%

TABLE 1

DISPOSITION OF NONTRAFFIC CHARGES IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases*

Disposition of Charges	*Percent of Persons*		
	Attorney Defended Cases		*Comparable Undefended Cases*
All charges were:			
Dismissed	46%		5%
Given time served	–		9
Either dismissed, given time served, or continued	8		2
Continued with possible penalty	9		27
TOTAL NOT GIVEN IMMEDIATE PENALTY		63%	
One or more charges were given:			
Fine only	3%		1%
Fine or time in jail	28		41
Fine or time, plus mandatory time	6		7
Time only	–		8
TOTAL GIVEN IMMEDIATE PENALTY		37	
TOTAL PERCENT		100%	
TOTAL NUMBER OF PERSONS		35	

* Defended cases were matched to other cases on the following factors, and in priority shown:

(1) Number and type of charge
(2) Race
(3) Sex
(4) Age
(5) Facial foliage of men

TABLE 2

DISPOSITIONS OF TRAFFIC CHARGES IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases*

Disposition of Charges	Percent of Persons: Attorney Defended Cases		Percent of Persons: Comparable Undefended Cases	
All charges were:				
Dismissed	24%		12%	
Suspended, dismissed or continued	14		4	
TOTAL NOT GIVEN IMMEDIATE PENALTY		38%		16%
One or more charges were given:				
Reduced charge and penalty	5%		–	
Some dismissed, some penalized	11		4%	
Forfeited bail	8		1	
Fine only	–		1	
Fine or time in jail	22		50	
Penalty including mandatory traffic school	13		24	
License suspended plus penalty	3		1	
TOTAL GIVEN IMMEDIATE PENALTY		62		84
TOTAL PERCENT		100%		100%
TOTAL NUMBER OF PERSONS		37		121

*Defended cases were matched to enter cases on the following factors, and in the priority shown:

(1) Number and type of charge
(2) Race
(3) Sex
(4) Age
(5) Facial foliage of man

TABLE 3

PLEAS TO TRAFFIC AND NONTRAFFIC CHARGES IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases

	TRAFFIC		NONTRAFFIC		TOTAL	
Pleas	*Defended*	*Undefended*	*Defended*	*Undefended*	*Defended*	*Undefended*
Not guilty	30%	10%	33%	11%	31%	11%
Changed from not guilty to guilty	26	5	30	11	28	8
Guilty	2	65	6	70	4	68
All other pleas	8	3	2	2	5	2
No plea, plea unknown	34	17	29	6	32	11
TOTAL PERCENT	100%	100%	100%	100%	100%	100%

TABLE 4

PENALTY BY PLEA IN RENO MUNICIPAL COURT
Comparison of Defended vs. Comparable Undefended Cases

Penalty	Percentage of Pleas		
	Not Guilty	*Changed Not Guilty to Guilty*	*Guilty*
NONTRAFFIC			
Defended cases			
Dismissed	78%	—	a
No immediate penalty	6	40%	a
Immediate penalty	16	60	a
Total percent	100%	100%	100%
Undefended cases			
Dismissed	62%	3%	4%
No immediate penalty	21	47	40
Immediate penalty	17	50	56
Total percent	100%	100%	100%
TRAFFIC			
Defended cases			
Dismissed	65%	25%	a
No immediate penalty	6	25	a
Immediate penalty	29	50	a
Total percent	100%	100%	100%
Undefended cases			
Dismissed	18%	—	4%
No immediate penalty	5	43%	1
Immediate penalty	77	57	95
Total percent	100%	100%	100%
ALL TYPE CASES			
Defended cases			
Dismissed	71%	13%	a
No immediate penalty	6	32	a
Immediate penalty	23	55	a
Total percent	100%	100%	100%
Undefended cases			
Dismissed	37%	2%	4%
No immediate penalty	15	46	22
Immediate penalty	48	52	74
Total percent	100%	100%	100%

a. Too few cases.

No 70-5015

JUN 23 1971

E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

~~No. 5798~~

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 5798

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONER

OPINION BELOW

The opinion of the Florida Supreme Court is reported at 236 So.2d 442 (Fla. 1970), and (A. 8).

JURISDICTION

The judgment of the Florida Supreme Court was entered on June 3, 1970. A petition for rehearing was denied on July 7, 1970. A petition for writ of certiorari was filed on

September 1, 1970. Certiorari was granted on February 22, 1971. The jurisdiction of the Court rests on 28 U.S.C. §1257(3).

QUESTION PRESENTED

Whether the Sixth and Fourteenth Amendments guarantee the right to counsel to an indigent defendant who upon conviction, faces a maximum penalty which does not exceed six months imprisonment and a one thousand dollar ($1,000) fine.

CONSTITUTIONAL PROVISION INVOLVED

Amendment Six—Jury trials for crimes, and procedural rights.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and *to have the assistance of counsel for his defense.* (Emphasis added)

Amendment Fourteen, Section 1.

> . . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

JON RICHARD ARGERSINGER was arrested on January 12, 1970, in Leon County, Florida, and charged with the offense of carrying a concealed weapon, an offense carrying a maximum punishment of six months imprisonment or one thousand dollars ($1,000.00) or both.[1] He was arraigned and plead guilty the next day, January 13, 1970, and was sentenced by a judge of the county court to pay a fine of $500 and in default of such payment to be imprisoned in the county jail, Leon County, Florida, for a period of three months. (A. 1, 2, 4, 5)

On January 20, 1970, an original petition for writ of habeas corpus was filed in the Florida Supreme Court, alleging that ARGERSINGER was tried and convicted by the Leon County Court without first having been advised of his right to counsel or that counsel would be appointed for him if he could not afford an attorney. (A. 1, 2)

The Supreme Court of Florida ordered petitioner released on a $500 appearance bond on January 20, 1970, and ordered the State of Florida to show cause why the petition for writ of habeas corpus should not be granted. (A. 3)

There is no dispute regarding the question of whether or not any attempt was made to advise petitioner of his right to counsel. It is clear that no advise as to counsel was given.[2]

On June 3, 1970 the Florida Supreme Court, in a four to three decision, discharged the writ of habeas corpus and remanded ARGERSINGER to the custody of the respondent, HAMLIN. That decision limited the right to counsel in non-felony cases in the State of Florida to misdemeanors which carry a maximum punishment in excess of six months imprisonment. Since the maximum penalty which ARGER-

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[1] Fla. St. §790.01(1) (1969).

[2] The lower court record consisted of Commitment Order of the County Judge, Exhibit A, of Response to Writ of Habeas Corpus filed in the Florida Supreme Court January 29, 1970 (A. 7).

SINGER could have received was six months imprisonment and a $1,000 fine, the Supreme Court of Florida held that he was not entitled to counsel under the Sixth and Fourteenth Amendments.

On September 8, 1970, this Court, by order of Mr. Justice Black, allowed the petitioner to remain at liberty upon the posting of bail in the amount of five hundred dollars ($500).

The federal question presented was raised in the original habeas corpus proceeding brought in the Florida Supreme Court. That question, i.e., right to counsel, was the sole contention raised in the petition. The June 3, 1970 decision was based solely and explicitly upon the issue of the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States.

SUMMARY OF ARGUMENT

A. The decisions of this Court, from *Powell v. Alabama*,[3] to *Gideon v. Wainwright*,[4] and *In re Gault*,[5] support the proposition that any accused defendant cannot be deprived of his liberty unless he has, or intelligently waives, the assistance of counsel.

While those decisions do not speak directly to the question of counsel in a case involving a maximum penalty of six months or less, they do recognize counsel as being fundamental to due process and an essential element of our adversary system of justice. Moreover, the Sixth and Fourteenth Amendments do not limit the mandate of due process and assistance of counsel only to "serious offenses." Thus whenever a loss of liberty is threatened, the right to counsel must be extended.

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[3] 287 U.S. 45 (1932).

[4] 372 U.S. 335 (1962).

[5] 387 U.S. 1 (1967).

Relying upon *Gideon v. Wainwright*,[6] several state and federal courts have concluded that the right to counsel extends to all who face the possibility of incarceration. *State v. Borst*;[7] *James v. Headley*;[8] and *Patterson v. Purdy*.[9]

B. No sound constitutional theory has been advanced that would justify limiting the right to counsel only to offenses which carry a potential punishment of over six months incarceration. The cases which reach that conclusion do so by erroneously seeking to equate the right to counsel with the right to a jury trial because both guarantees reside in the Sixth Amendment, and by utilizing the standards for compensated counsel set forth in Title 18 U.S.C. §3006A.

The jury trial analogy fails to consider the inherent differences between the two rights, i.e., that fair trials can be had before a judge alone, while the assistance of counsel is a prerequisite to fairness. Moreover, the analogy disregards the decisions of this court which have never limited other Sixth Amendment rights only to "serious offenses."[10]

The attempt to fashion a "petty offense" rule from the Criminal Justice Act, 18 U.S.C. §3006A (as amended) is also without merit. That section provides standards only for the compensation of counsel in the federal system, not for the extent of the constitutional guarantee. The legislative history of the act in fact supports the conclusion that petty offenses are within the guarantee of counsel.

C. The failure to provide counsel for indigent persons charged with "minor offenses," while allowing counsel to those who can afford a lawyer constitutes an invidious discrimination in violation of the Equal Protection Clause of

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[6] *Supra*, n. 4.

[7] 154 N.W.2d 888 (Minn. 1967).

[8] 410 F.2d 325 (1969).

[9] ___F. Supp.___ (S.D. Fla. No. 69-957-Civ-Je, 1970).

[10] *In re Oliver*, 333 U.S. 257 (1948).

the Fourteenth Amendment. *Griffi. v. Illinois*;[11] *Cf. Miranda v. Arizona*.[12] No "compelling interest" exists which justifies the irrational classification created by the failure to provide counsel. *Cf. Shapiro v. Thompson*.[13]

D. The decisions which limit the right to counsel to "serious offenses" do so out of fear that a general extension of counsel would cripple our system of justice. Those decisions envision required counsel for jaywalkers, sidewalk spitters and overtime parkers—a vision which portrays the courts being burdened with long, costly proceedings in what are essentially *de minimus* offenses.

The petitioner submits that this fear bespeaks a lack of faith in the resiliency and imaginetiveness of our system. The vast majority of minor offenses carry no real threat of serious penalty—either jail or heavy fine. Thus reclassification of those offenses to reflect the true nature of the possible punishment would exclude those cases from the category requiring counsel. Other offenses—the victimless crimes—could be reclassified so that they too would reflect either the true potential punishment or possibly even be eliminated from consideration as "crimes." Law students can be utilized to represent persons in minor kinds of cases. Para-legal personnel could fulfill similar functions.

Extending the right to counsel would not create chaos, it would create a speedier, more just and equitable court system.

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[11] 351 U.S. 12 (1956).

[12] 384 U.S. 436 at 472-473 (1966).

[13] 394 U.S. 618, 638 (1969).

ARGUMENT

THE SIXTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION REQUIRE THAT EVERY PERSON FACING INCARCERATION FOR THE COMMISSION OF AN OFFENSE, NO MATTER WHAT ITS DESIGNATION, IS ENTITLED TO BE ADVISED OF HIS RIGHT TO COUNSEL AND IN THE CASE OF AN INDIGENT HAVE COUNSEL APPOINTED TO HIM.

A. The Cases Decided by This Court; By Various Federal Courts and by Various State Appellate Courts Compel the Conclusion that the Petitioner Should Have Been Afforded the Right to Counsel.

1. *Gideon v. Wainwright.*[14]

Any examination of the right to counsel must begin with *Gideon v. Wainwright.*[15] In *Gideon* this Court held that a defendant, charged with a felony, could not be assured a fair trial unless counsel was provided for him. The opinion was written in language that recognized the essential nature of counsel:

> In our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.[16]

The decision in *Gideon* drew its strength from earlier cases which regarded the right to counsel as "fundamental." *Powell v. Alabama,*[17] *Johnson v. Zerbst.*[18]

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[14] *Supra,* n. 4.

[15] *Supra,* n. 4.

[16] 373 U.S. at 344.

[17] 287 U.S. at 68 (1932). The historical background of the right to counsel is explored at 287 U.S. 60-65. At common law a right to counsel existed for misdemeanors and civil matters, but not for felonies. Of interest is the fact that Florida, prior to *Gideon*, and to the present, has always provided for counsel in eminent domain proceedings by constitutionally guaranteeing reasonable attorney fees to the landowner's lawyer. See, Fla. St. §§ 73.11, 73.16 and 74.10.

[18] 304 U.S. 458, 462 (1938).

Gideon gave birth to later holdings which extended the right to counsel to an individual suspect subjected to pre-repetitious interrogation, *Massiah v. United States*;[19] to the suspected offender, *Escobedo v. Illinois*;[20] to the in-custody suspect, *Miranda v. Arizona*;[21] to probation revocations, *Mempa v. Rhay*;[22] to juveniles, *In re Gault*;[23] to lineups, *U.S. v. Wade*,[24] *Gilbert v. California*;[25] to preliminary hearings, *Coleman v. Alabama*.[26]

Thus counsel, or at least the right to counsel, has become the *sine qua non* of fairness at every stage of a felony proceeding in order to protect the integrity of the fact finding process of trial. No constitutional theory justifies limiting that protection to "serious offenses."

The Constitution does not condition its guarantees upon the number of days a person may spend in jail.

The Fourteenth Amendment states in part ". . . Nor shall any state deprive any person of life, liberty or property, without due process of law . . . ." "The fundamental requisite of due process of law is the opportunity to be heard," *Grannis v. Ordean*.[27] Mr. Justice Sutherland wrote in *Powell v. Alabama*: "The right to be heard would be in many cases, of little avail if it did not comprehend the right to be heard by counsel."[28]

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[19] 377 U.S. 200, 205 (1964).

[20] 378 U.S. 478, 487 (1964).

[21] 384 U.S. 436, 472-473 (1966).

[22] 389 U.S. 128, 134 (1967).

[23] 387 U.S. 1 (1967).

[24] 388 U.S. 218 (1967).

[25] 388 U.S. 263 (1967).

[26] 399 U.S. 1 (1970).

[27] 234 U.S. 385, 394 (1914).

[28] 287 U.S. at 68-69.

The decisions of this court lead inexorably to the conclusion that depriving a man of his liberty without affording him a right to a lawyer is violative of the Sixth and Fourteenth Amendments. It is a conclusion which other courts have already drawn from *Gideon* and its progeny.

2. *The Federal Cases Extending Gideon.*

Nearly thirty years ago the United States Court of Appeals for the District of Columbia faced the question of whether the right to counsel applied only to "serious offenses." *Evans v. Rives.*[29] The Court unanimously responded:

> Insofar as the right to the assistance of counsel is concerned, the Constitution draws no distinction between loss of liberty for a short period and such loss for a long one.[30]

The Fifth Circuit has held that the right to counsel applied to a defendant charged with a misdemeanor carrying 90 days and a $500 fine, *Harvey v. Mississippi;*[31] to two traffic offenses punishable by a total of 90 days and a $750 fine, *Bohr v. Purdy;*[32] to municipal court defendants facing 90 days or a $500 fine, *Wooley v. Consolidated City of Jacksonville.*[33]

In *James v. Headley,*[34] the Court reversed a district court decision which would have limited the right to counsel only to "serious offenses" i.e., those carrying a penalty in excess of six months. The decision was based on *Harvey v. Mississippi.*[35] Judge Wisdom went further:

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[29] 126 F.2d 633 (D.C. Cir. 1942).

[30] 126 F.2d at 638.

[31] 340 F.2d 263 (5th Cir. 1965).

[32] 412 F.2d 324 (5th Cir. 1969).

[33] 433 F.2d 980 (5th Cir. 1970).

[34] 410 F.2d 325 (5th Cir. 1969).

[35] *Supra,* n. 31, At least 250 Florida court convictions for "minor offenses" have been set aside by the United States District Courts for the Middle and Southern Districts of Florida in the past two years, based on the *Harvey* line of decisions. See, William A. McRae, Jr.,

> I start with the general principle that the Sixth Amendment establishes the right to counsel in *all* criminal prosecutions. There is no distinction between felonies and misdemeanors, between gross and petty offenses, between the loss of liberty for 181 days and the loss of liberty for 180 or fewer days.[36]

Although voicing concern over the impact of affording counsel to *de minimus* offenses, Judge Wisdom wrote:

> I take the position that regardless of labels, an offense is serious enough to require appointment of counsel if it may result in a loss of liberty for any period of time.[37]

In *Patterson v. Purdy*,[38] the Court decided that a woman convicted of a traffic offense carrying a possible 30 day sentence was entitled to be advised of her right to counsel no matter the number of days she could have received.

Except for *Brinson v. Florida*[39] and its offspring, *Wall v. Purdy*[40] and a footnote in *Beck v. Winters*,[41] lower courts have concluded that the Sixth and Fourteenth Amendments mean what they say—the right to counsel lives, even in the low visibility of the criminal process.

The Administration of Justice in the Federal District Courts, 23 U. Fla. L. Rev. No. 2, at Appendix P. (to be published, May 1971). See also, *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969) where Justice of the Peace Courts in Volusia County, Florida were enjoined from trying misdemeanors without first advising them of their right to counsel and see, *Phillips v. Cole*, 298 F. Supp. 1049 (N.D. Miss. 1968) where a similar injunction was entered.

[36] 410 F.2d at 334. (Emphasis in original).

[37] 410 F.2d at 334.

[38] ___F. Supp.___ (S.D. Fla. No. 69-975-Civ-Je, 1970).

[39] 273 F. Supp. 840 (S.D. Fla. 1967).

[40] 321 F. Supp. 367 (S.D. Fla. 1970).

[41] 407 F.2d 125, 130 & n. 13 (8th Cir. 1969).

3. *The State cases extending Gideon.*

The trend of recent decisions has been towards recognizing the right to counsel in misdemeanors. It is very difficult to make any comparison because of the differences between state laws. In addition, there is a great deal of difference between the application of even similar laws in the states. Then there are conflicts within states, and between the existing state law and the Federally administered law within a given state. And the federal law itself is conflicting.

The states can be broken down into three groups as to the application of *Gideon*:[42] those that only appoint counsel for felonies,[43] those that appoint counsel for felonies and "serious crimes"[44] and those which appoint counsel for all or most misdemeanors.[45]

ALABAMA

Before *Gideon* in Alabama, counsel was only appointed in capital cases.[46] In applying *Gideon*, Alabama has followed the "serious crime" doctrine.[47] This is because of the word-

[42] Two articles were of great help in the computation of the various states: Decker and Lorigan, *Right to Counsel: the Impact of Gideon v. Wainright in the 50 States*, 3 Creighton L. Rev. 103 (1970); Phelfs, Senior Research Project, Northwestern University School of Law (1971, Unpublished).

[43] Alaska, Arkansas, Kansas, Kentucky, Louisiana, Maine, Mississippi, Montana, Nebraska, Ohio, Rhode Island, Tennessee, Virginia, Washington.

[44] Alabama, Arizona, Florida, Idaho, Maryland, Missouri, Nevada, New Mexico, North Carolina, South Carolina (although questionable), Utah, Wisconsin.

[45] California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana (but only as to large counties), Iowa, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New York, North Dakota, Oklahoma, Oregon, Pennsylvania, South Dakota, Texas, Vermont, West Virginia, Wyoming.

[46] Ala. Code Title 15, § 318 (1958).

[47] *Irvin v. State*, 44 Ala. App. 101, 203 So.2d 283 (1967).

ing of their statute which covers only "serious crimes" and not because of any constitutional grounds. The State Supreme Court in *Irvin v. State*[48] pointed out a number of factors that should be considered by a court in determining if a "serious crime" has been committed, but did not draw any concrete lines as to the limits. The trial judge must determine in each case, by considering the circumstances of the case, whether or not counsel should be appointed. Alabama is in the Fifth Circuit but, there do not seem to be any significant Federal cases which have applied the 5th Circuit Rule to Alabama.

ALASKA

Prior to *Gideon*, Alaska only recognized the right to counsel as to felons.[49] The Alaskan Rules of Criminal Procedure[50] presently state that upon appropriate request, a defendant who is unable financially to afford counsel will be appointed counsel by the court.[51] However, the Magistrate's Criminal Rules specifically makes this provision inapplicable in the lower courts.[52] Therefore, only misdemeanors which are tried in the Superior Court are afforded the right.

The Alaska Supreme Court recently rejected the "petty offense" standard for jury trials.[53] Some have taken the dicta, in reference to right of counsel in the case, as an indication that the court would rule the same on that point as well.[54] A closer reading of the court's opinion would not necessarily lead to such a conclusion.

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[48] *Id.*

[49] Alaska R. of Crim. P. 39 (b) (1963).

[50] Alaska R. of Crim. P. 39 (b) (Supp. 1968).

[51] Alaska R. of Crim. P. 39 (c) (Supp. 1968).

[52] Alaska Mag. Crim. R. 1(j) (Supp. 1968).

[53] *Baker v. City of Fairfax*, 471 P.2d 386 (Alas. 1970).

[54] *Id.* at 395.

ARIZONA

In 1964 the Arizona Supreme Court announced that counsel was required in "serious misdemeanors" and left to the trial judges the determination of a "serious misdemeanor."[55] Then *Burrage v. Superior Court*[56] was concluded and the court further defined their prior holding. The *Burrage* case dealt with defendants who were charged with crimes where the maximum punishment was five months in jail or $500, or both. The court ruled that "a reasonable interpretation of the Constitution (U.S.) does not require that there be legal representation for all misdemeanors."[57] The court also looked to the Federal Rules and stated that lawyers are required for all except "petty offenses" which they define as those where the penalty may exceed six months or a fine of $500.[58] At this point the court went on to hold:

> . . . counsel for indigent misdemeanants must be provided in all cases where the maximum punishment exceeds $500 in fines or six months imprisonment, or both, and may be provided if the trial court in its discretion believes that the complexity of the case is such that the ends of justice require legal representation.[59]

Thus Arizona is a state with a six-month rule, based upon the Federal Rules.

ARKANSAS

The *Beck v. Winters*[60] case which became the 8th Circuit Rule came from this state. This case has often been cited

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[55] *State v. Anderson*, 96 Ariz. 123, 392 P.2d 784 (1964).

[56] 105 Ariz. 53, 459 P.2d 314 (1969).

[57] *Id.* at 315.

[58] 18 U.S.C. § 3006 A.

[59] *Burrage v. Superior Court, supra*, n. 56, at p. 315.

[60] 239 Ark. 1151, 394 S.W.2d 364 (1965), cert. den. 385 U.S. 907 (1966); *See also* 407 F.2d 125 (8th Cir. 1969).

as an indication that this Court feels that the right should not be extended to misdemeanors. However, the case did not stop with the denial of *certiorari* by this Court from the Supreme Court of Arkansas. That court had denied the right to counsel in misdemeanors.[61] The case continued confusing matters when action was filed in the federal court system and the right to counsel was granted by the lower federal court and upheld by the 8th Circuit.[62] This case then was once again appealed to this Court, which denied *certiorari* for the second time. The only thing that can be positively concluded about *Beck v. Winters* is that in Arkansas the state courts are still enforcing *Beck v. Winters* (the state proceeding),[63] and thus only providing counsel for indigents "about to be arraigned upon an indictment for a felony;"[64] while at the same time the federal courts of the same state follow *Beck v. Winters* (8th Circuit proceeding) which held there was a right to counsel in at least some misdemeanors.[65]

CALIFORNIA

The California Supreme Court held in *In re Johnson*[66] that the right to counsel covers all misdemeanors, including municipal and other lower courts, even traffic violations.[67]

COLORADO

Colorado has a Public Defender system, and they are required by statute[68] to represent indigents charged with municipal ordinance violations.

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[61] *Id.*

[62] *Beck v. Winters*, 407 F.2d 125 (8th Cir. 1969).

[63] Also see *Cabeleon v. State*, 243 Ark. 351, 420 S.W.2d 534 (1967).

[64] Ark. Stat. Ann. §43-1203 (repl. 1964).

[65] *Supra*, n. 41.

[66] 62 Cal.2d 325, 398 P.2d 420 (1965).

[67] *Blak v. Municipal Court*, 242 Cal. App.2d 857, 51 Cal. Rptr. 771 (1966).

[68] Col. Rev. Stat. Ann. §39-21-3 (1969 Supp.).

CONNECTICUT

In the case of *State v. Simmonds,*[69] the court held that the right to counsel applies to misdemeanors (the defendant there was charged with the breach of the peace) and requires a knowing waiver of the right.

DELAWARE

The Rules of the Justice of the Peace Courts of this State require the appointment of counsel "if the defendant desires counsel and is unable to obtain counsel."[70]

FLORIDA

The state courts in Florida, up until *Argersinger v. Hamlin*[71] had adhered to the felony rule,[72] but held in *Argersinger* that counsel must be provided where the potential penalty exceeds six months imprisonment, and notice must be given. The federal courts in Florida follow the 5th Circuit Rule and this lead to a great deal of confusion.[73] In practice some lower state courts and municipal courts provide the right and others do not.[74]

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[69] 5 Conn. Cir. 178, 247 A.2d 502 (1968).

[70] Rule 26, Del. Justice of the Peace Crim. Rules.

[71] 236 So.2d 442 (Fla. 1970).

[72] *Fish v. State,* 159 So.2d 866 (Fla. 1964), *Watkins v. Morris,* 179 So.2d 348 (Fla. 1965), *State ex rel. Taylor v. Warden of Orange County Prison Farm,* 193 So.2d 606 (Fla. 1967).

[73] *Harvey v. Mississippi,* 340 F.2d 263 (5th Cir. 1965), also see *Boyer v. City of Orlando,* 402 F.2d 966 (5th Cir. 1968), *MacDonald v. Moore,* 353 F.2d 106 (5th Cir. 1965), *James v. Headley,* 410 F.2d 325 (5th Cir. 1965), and *Bohr v. Purdy,* 412 F.2d 321 (5th Cir. 1969).

[74] In Miami Beach, counsel is provided for all misdemeanors and in Tampa some Municipal Judges give notice of the right and other judges do not. In Tallahassee the right is not practiced (Information from personal experience of Petitioner's counsel).

GEORGIA

By statute in Georgia, counsel is appointed in felony cases[75] but the courts in Georgia have held that the right does extend to misdemeanors and has implied it might extend to ordinance violations.[76] The same court also stated in dictum that the right was not absolute as to misdemeanors.[77] However, the right does not seem to be evenly administered in Georgia.[78]

HAWAII

The State Constitution requires appointment of counsel in indigent cases where the accused could receive a sentence of imprisonment for more than sixty days.[79]

IDAHO

By statute in Idaho, "needy persons are required to be represented by counsel, if they are charged with a serious crime."[80] "Serious crimes" are defined as felonies or misdemeanors for which the penalty includes confinement for more than six months or a fine of $300.[81]

ILLINOIS

By statute in Illinois, if the defendant is indigent and desires counsel, in all cases, except where there is only a fine, the public defender is appointed.[82] But in one confusing case it was held that the courts do not have to inform the defendant of his right to counsel.[83]

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[75] Ga. Code Ann. §27-3001.

[76] *Taylor v. City of Griffin*, 113 Ga. App. 589, 149 S.E.2d 177 (1966), *cert. den.* 385 U.S. 1016 (1967).

[77] *Id.*, 149 S.E.2d at 178.

[78] See *Shephard v. Jordan*, 425 F.2d 1174 (5th Cir. 1967).

[79] Hawaii St. Const. (1968), Art. I, §11.

[80] Idaho Code Ann., §19-852 (1969 Supp).

[81] Idaho Code Ann., §19-851 (1969 Supp).

[82] Ill. Ann. Stat. Ch. 38 §133 (Supp. 1971).

[83] *People v. Dupree*, 42 Ill.2d 249, 246 N.E.2d 281 (1969).

INDIANA

The law pertaining to right to counsel in this state is difficult to understand. The case law requires the right of counsel in misdemeanors as far back as 1951,[84] but this was never widely followed. Then the state enacted a public defender program for the large counties. This act was later extended[85] but it does not seem to have changed the fact that the right to counsel is practiced only in the large counties.

IOWA

The State Supreme Court held last year that counsel must be appointed for indigents accused of any indictable offense (punishable by imprisonment for more than thirty days) and the defendant must be advised of his rights.[86] This holding was based upon a state statute.[87] Although the Sixth and Fourteenth Amendment arguments were raised, the court ruled it was not basing the decision on them specifically.[88]

KANSAS

Kansas only appoints counsel and recognizes the right to counsel as to felonies.[89]

KENTUCKY

The Kentucky Rules of Criminal Procedure require the appointment of counsel before arraignment in cases where the defendant is charged with a crime for which the punishment is a fine of more than $500, or confinement for more than twelve months, or confinement in the penitentiary.[90]

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[84] *Bolkovac v. State*, 229 Ind. 294, 98 N.E.2d 250 (1951); also see *Speight v. State*, 239 Ind. 157, 155 N.E.2d 752 (1959).

[85] Ind. Ann. Stat. §9-3501 (Supp. 1971).

[86] *Wright v. Denato*, 178 N.W.2d 339 (Iowa 1970).

[87] Iowa Code Ann., §775.4 and .8.

[88] *Supra*, note 86.

[89] Kan. Gen. Stat. Ann. §22-4503 (1970 Supp.).

[90] Ky. Crim. Pro. Rule 8.04.

The Rule states that the appointed counsel should represent the defendant in all future stages of the proceeding and it would seem to include all aspects of appeals as well as the trial.[91]

LOUISIANA

Louisiana statutes require the appointment of counsel only in felony cases.[92] The state court decisions have not extended the right any further,[93] but Louisiana's federal courts, like Florida's and other state's, have extended the right thus leaving a conflict.[94]

MAINE

The Maine courts are required to inform defendants of their right to counsel, but the appointment is not so clear.[95] All defendants charged with felonies are required to be advised of their right to counsel at the beginning of any proceeding, and be provided counsel if indigent,[96] but in misdemeanor cases the court "may" appoint counsel.[97]

MARYLAND

At all stages of court proceedings the accused must be informed of his right to counsel[98] and provided counsel if the offense carries a penalty of imprisonment for 6 months or more or a fine of $500 or both.[99] The court may also

[91] *Id.*

[92] La. Rev. Stat. Titl. 15, Art. 141 (F).

[93] *State v. Rockeymore*, 253 La. 101, 216 So.2d 828 (1968) (indigency was not a factor); *State v. Angelo*, 251 La. 250, 203 So.2d 710 (1967) (indigency was not a factor); *Cortincz v. Flournoy*, 249 La. 714, 190 So.2d 909, cert. den. 385 U.S. 925 (1966).

[94] *Petition of Thomas*, 261 F. Supp. 263 (W.D. La. 1966) Aff'd sub. nom., *Goslin v. Thomas*, 400 F.2d 594 (5th Cir. 1968).

[95] Me. Rev. Stat. Ann. Title 15 §810, Compare Me. R. Crim. P. 44.

[96] Me. R. Crim. P. 44.

[97] *Id.*

[98] Md. Rule 719 (b) 1.

[99] Md. Rule 719 (b) 2(a).

assign counsel in any other case where the complexity of the case, the youth, inexperience or mental ability of the accused warrant it.[100] In addition, the Maryland rules provide that if an accused is indigent he may request the assistance of counsel himself.[101]

MASSACHUSETTS

The Supreme Court held in *MacDonnel v. Commonwealth*[102] that the court rules[103] of the state required advice of counsel in minor misdemeanor cases, but that there would be "proceedural problems" as to the bar in attempting to extend the right of counsel to all of these cases.[104] However, the test of *MacDonnel* is a possibility of imprisonment and if this exists, counsel must be appointed.

MICHIGAN

Michigan has followed the "three month rule." If the charge facing a defendant is punishable by more than 3 months in jail and the person is indigent, he is entitled to counsel and must be informed of his right.[105] Although a defendant charged with a crime having a lesser penalty is not entitled to counsel at the trial level, he is afforded the right on appeal.[106] The "three month rule" seems to be a line that has been arbitrarily drawn because of the jurisdiction of the Justice of the Peace Courts, which in Michigan have jurisdiction up to this point, and not because of any constitutional grounds.[107]

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[100] See *Manning v. State*, 237 Md. 349, 206 A.2d 563 (1965).

[101] Md. Rule 719 (b) 3.

[102] 230 N.E.2d 821 (Mass. 1967).

[103] Mass. Sup. Jud. Ct. Rule 3:10.

[104] *Supra*, n. 102 at p. 823.

[105] *People v. Mallory*, 378 Mich. 538, 147 N.W.2d 66 (1967).

[106] *Id.* and *People v. Lewis*, 15 Mich. App. 225, 166 N.W. 2d 491 (1968).

[107] Mich. Comp. L. §775.16.

MINNESOTA

Minnesota is the leading state following the rule expounded by the petitioner here. A defendant faced with a possibility of incarceration has the right to counsel and if it is determined (that he is) an indigent, he must be appointed counsel. The Minnesota Supreme Court ruled in 1967 that counsel must be appointed to represent an indigent defendant if the offense he was charged with could result, upon conviction, in incarceration.[108] The court there pointed to *Gideon* for the basis of its ruling,[109] and stated that ". . . to insure the fair administration of justice, we decided that counsel should be provided in any case, whether it be a misdemeanor or not, which may lead to incarceration in a penal institution."[110]

MISSISSIPPI

By statute in Mississippi the courts are required to appoint counsel in all capital cases, and may appoint counsel in felony cases less than capital cases.[111] However the case law has required appointment in all felonies based upon *Gideon*.[112] Mississippi is also the home of the "90-day rule," resulting from the decision of the 5th Circuit in *Harvey v. Mississippi*[113] thus making a conflict in the federal and state law in Mississippi.

MISSOURI

By statute and rules in Missouri, counsel must be afforded anyone arraigned for a felony.[114] However, an Attorney

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[108] *State v. Borst*, 278 Minn. 388, 154 N.W.2d 888 (1967).

[109] *Id.* at p. 894.

[110] *Id.*

[111] Miss. Code Ann. § 2505 (1967 Supp.).

[112] *Conn v. State*, 251 M. 488, 170 So.2d 20 (1964).

[113] 340 F.2d 263 (5th Cir., 1965).

[114] Mo. Rev. Stat. §545.820, and Mo. R. Crim. P. 29.01.

General's opinion has stated that counsel may be appointed in Magistrate Court, and all coming before that Court should be advised of their right to appear by counsel. The same opinion also rules that counsel must be appointed in all misdemeanor cases ". . . of more than minor significance and in a case where prejudice might result."[115] The state rule is therefore in conflict with that set out by the 8th Circuit.[116]

MONTANA

By statute in Montana, counsel must be appointed anyone charged with a felony[117] and this includes all appeals as well.[118] But the practice is to appoint counsel for some misdemeanors as well.[119]

NEBRASKA

Nebraska, by statute, requires appointment of counsel for anyone charged with a felony and brought before a magistrate.[120] Here again there is a conflict between the state law and the federal law because Nebraska lies within the 8th Circuit.[121]

NEVADA

In Nevada, persons must be informed of the right to counsel when brought before a magistrate[122] and provided with counsel if indigent and charged with a misdemeanor punishable by more than six months in jail or more than a $500 fine or both.[123]

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[115]Mo. Op. Atty. Gen. No. 207, Young 6-21-63.

[116]See *Beck v. Winters, supra,* n. 60.

[117]Mont. Rev. Code Ann. §95-1001.

[118]Mont. Rev. Code Ann. §95-1003.

[119]36 Mont. L. Rev. 1, at 3 (1964).

[120]Neb. Rev. Stat. Sec. 29-1803 (1967).

[121]See *Beck v. Winters, supra,* n. 60.

[122]Nev. Rev. Stat. 171.370.

[123]Nev. Rev. Stat. Sec. 171.188 and 193.104 (1969).

NEW HAMPSHIRE

By statute in New Hampshire, every defendant charged with a crime where incarceration is a possibility, or a fine of more than $500 may be levied, is entitled to be represented by counsel and be advised of such right.[124]

NEW JERSEY

The New Jersey Revised Rules provide that "every person charged with an indictable offense shall be advised by the court of his right to retain counsel and to have the Office of the Public Defender represent him if he is indigent."[125] The right seems to be an absolute one, because non-indictable offenses are not crimes in New Jersey.

NEW MEXICO

By statute in New Mexico any indigent charged with a "serious crime" which is defined as including any felonies and misdemeanors which carry a possible penalty of imprisonment for more than six months,[126] must be afforded the right to counsel.

NEW YORK

In New York the defendant must be advised of his right to have counsel and if indigent he must be provided counsel, if he so desires,[127] except for traffic offenses.[128]

NORTH CAROLINA

The state court has held that persons charged with crimes punishable by more than six months in jail or more than

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[124] N.H. Rev. Stat. Ann. Sec. 604-A:1, 604-A:2 (1970 Supp.).

[125] N.J. Rules 3:27-1.

[126] N.M. Stat. Ann. §41-22-2 and 3 (Supp. 1969).

[127] *People v. Witenski,* 15 N.Y.2d 392, 207 N.E.2d 358 (1965).

[128] *People v. Lettorio,* 16 N.Y.2d 307, 213 N.E.2d 670, cert. den. 384 U.S. 911 (1965).

$500 fine, and who are indigent, are entitled to counsel and must be so advised.[129]

NORTH DAKOTA

In a recent case the Supreme Court in North Dakota held that the statutes of that state[130] require appointment of counsel for defendants if the charge is criminal in nature whether the offense is a misdemeanor or a felony.[131]

OHIO

Ohio courts have ruled that because of their statutes[132] an accused must be informed as to his right to counsel and this is not limited to felonies. But the same court also ruled that this does not require the appointment of counsel if the accused is indigent, unless it is a felony—therefore limiting the right only to indigent felons.[133]

OKLAHOMA

Even before *Gideon*, Oklahoma had extended the right to counsel to misdemeanors,[134] but the case was not followed in practice. Recently, the state legislature has passed legislation which allows a Public Defender program to be set up for municipalities for indigents charged with municipal ordinance violations. This is an optional program.[135]

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[129] *State v. Morris*, 275 N.C. 50, 165 S.E.2d 245 (1959) also *Bennett v. Hurley*, 315 F. Supp. 1131 (E.D.N.C., 1967); *State v. Green*, 277 N.C. 188, 176 S.E.2d 756 (1970); *State v. Hickman*, ___N.C. App.___, 176 S.E.2d 910 (1970).

[130] N.D. Code 29-07-1.1.

[131] *State v. Heasley*, 180 N.W.2d 242 (N.D. 1970).

[132] Ohio Rev. Code 2937.02.

[133] *City of Toledo v. Frazier*, 10 O. App.2d 51, 226 N.E.2d 777 (1967).

[134] *Hunter v. State*, 288 P.2d 425 (Okla. Crim. 1965).

[135] Okla. Stat. Ann. Tit. 11 Sec. 959.1 and 959.3 (1967-71, Supp.).

OREGON

The Oregon Supreme Court has ruled in an extensive holding that

> . . . no person may be deprived of his liberty who has been denied the assistance of counsel guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations for municipal ordinances.[136]

PENNSYLVANIA

The Rules of Criminal Procedure of Pennsylvania require appointment of counsel for all indigents charged with indictable offenses.[137] The Rules also provide for the assignment of counsel ". . . whenever the interest of justice requires it." The comments after the Rule point out that this may even be in the case where the defendant is not an indigent.[138] The Rules also provide for counsel on appeal.[139]

RHODE ISLAND

Rhode Island statutes provide that the Public Defender is ". . . to represent and act as attorney for indigent defendants in those cases referred to him by the Supreme Court, and by the Superior Courts."[140] But in practice this means few, if any, indigents charged with misdemeanors are represented by counsel. This is because most misdemeanors are not tried in either of the above mentioned courts, but are within the jurisdiction of the District Courts, thus in practice, counsel is limited to felonies in Rhode Island.[141]

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[136] *Stevenson v. Holzman*, 89 O. 27, 458 P.2d 414 (1969).

[137] Penn. R. Crim. P., Rule 318.

[138] *Id.*

[139] *Id.*

[140] R.I. Gen. Laws Ann. 12-15-3.

[141] Compare, R.I. Gen. Laws Ann. §8-2-15 and §12-3-1.

SOUTH CAROLINA

South Carolina still has on its books a statute that only extends the right of counsel to capital offenses.[142] The case law of the State now extends to non-capital offenses.[143] And in still another case, the Supreme Court of the State confused the issue even further by holding that the right extends to "criminal prosecutions" and implied that this was to include lesser offenses, but the case before them was a felony and the Court did not clarify the Ruling.[144]

SOUTH DAKOTA

State statutes require that counsel be provided in "any criminal action."[145] This state is another state in the 8th Circuit and, thus seems to differ somewhat from that rule.[146]

TENNESSEE

Tennessee is the only state which has moved backwards. At the time of *Gideon*, the State statutes provided for appointment of counsel for ". . . every person accused of any crime or misdemeanor whatsoever."[147] But after *Gideon* the State enacted a new statute which only provides counsel ". . . in all felony cases."[148] Counsel also has been provided for felony appeals as well.[149]

TEXAS

State statutes have been enacted in Texas which would require appointment of an attorney for ". . . an accused

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[142] S.C. Code Ann. § 17-507.

[143] *Pip v. MacDougall*, 245 S.C. 98, 138 S.E.2d 840 (1964).

[144] *State v. Cowart*, 251 S.C. 360, 162 S.E.2d 535 (1968).

[145] S.D. Comp. Laws Ann. Secs. 23-2-1 and 23-2-3 (1970 Supp.).

[146] *Beck v. Winters, supra*, n. 60.

[147] Tenn. Code Ann. § 40-2002 and § 40-2003 (1955).

[148] Tenn. Code Ann. § 40-2017 (Supp. 1970).

[149] Tenn. Code Ann. § 40-2018 (Supp. 1970).

charged with a felony or misdemeanor punishable by imprisonment."[150]

UTAH

Utah, by statute, provides for assignment of counsel when the crime charged could result in ". . . confinement for more than six months in jail or prison."[151]

VERMONT

Vermont requires assignment of counsel ". . . in a criminal proceeding where the person is charged with a crime punishable by imprisonment for more than sixty days or by a fine of more than $1,000."[152] The right applies to appeals, extra-ordinary proceedings, and habeas corpus as well.[153]

VIRGINIA

By statute in Virginia, the right to counsel is only extended to persons who are charged with felonies.[154] But like many other states mentioned before, the state law in Virginia is in conflict with a Federal District Court decision which has recently held that the right extends to misdemeanors.[155]

WASHINGTON

By statute, one accused of a felony is guaranteed the right to counsel in Washington[156] but the State Supreme Court seems to extend the right to misdemeanors in *Tacoma v. Heater*[157] by saying ". . . the *Gideon* case means that every

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[150] Tex. Code Crim. Proc. § 26.04 and *Sallerwhite v. State*, 423 S.W. 592 (Tex. Crim. 1958).

[151] Utah Code Ann. § 77-64-2 (Supp. 1969).

[152] Vt. Stat. Ann. Tit. 13, Sec. 6503 (1970 Supp.).

[153] *Id.*

[154] Va. Code Ann. Sec. 19.1-241.1 (1970 Supp.).

[155] *Marston v. Oliver*, ___F.Supp.___, 8 Crim. L. Rptr. 2457 (E. D. Va. 1971).

[156] Wash. Rev. Code Ann. § 10.01.110 (Supp. 1970).

[157] 67 Wash. 733, 409 P.2d 867 (1966).

defendant has a constitutional right to counsel in all criminal prosecutions."[158] But the court began to vacillate and seems now to be trying to back-step with a very confusing decision in *Hendrix v. City of Seattle*[159] which purports to hold that the right to counsel, though it extends to misdemeanors, does not require the appointment of public counsel if the defendant cannot afford one.[160]

WEST VIRGINIA

In *Moats v. Janco*[161] the West Virginia Supreme Court of Appeals extended the right to counsel to misdemeanants facing incarceration. However, the decision was recently withdrawn,[162] partly because of the granting of certiorari in this case. Thus, the status of counsel in West Virginia awaits the decision of this Court.

WISCONSIN

Because of a lack of specific standards by either their legislature or this Court,[163] the Supreme Court of Wisconsin has used the Federal Criminal Justice Act as a guideline. The right in Wisconsin thus extends to indigents charged with misdemeanors where the potential penalty is more than six months imprisonment.[164]

WYOMING

"Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at

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[158] *Id.* at 869.

[159] 76 Wash. 142, 456 P.2d 696 (1969).

[160] The opinion was by J. Hale with the Chief Justice concurring and three judges concurring in the result only and four judges dissenting.

[161] *Moats v. Janco*, 8 Crim. L. Rept. 2285 (W.Va. 1971).

[162] *Moats v. Janco*, 9 Crim. L. Rept. 2038 (W.Va. 1971).

[163] *State ex rel. Tlutshack v. State Department of Health and Social Services*, 37 Wis.2d 713, 155 N.E.2d 549 (1968).

[164] *Supra*, n. 58.

every stage of the proceedings from his initial appearance before the Commissioner or the Court, through appeal, unless he waives the appointment."[165]

B. The Decisions Which Limit the Guaranty of Counsel to Offenses Which Carry a Possible Punishment of Over Six Months Are Incorrect.

In the decision below, *Argersinger v. Hamlin*,[166] the Florida Supreme Court adopted the "excess of six months" standard advanced in *Brinson v. Florida*.[167]

The Eighth Circuit in *Beck v. Winters*[168] was careful not to formulate a hard and fast rule to determine application of the right to counsel. But it did refer the reader to *Brinson* for direction.

So *Brinson* has emerged as the leading precedent for limiting the right to counsel only to "serious offenses," meaning those which carry more than a six months jail term as punishment. It is interesting to note that in *McDonald v. Moore*[169] the Fifth Circuit anticipated such a theory and found ". . . it would be difficult to sustain on any legal ground." And in reversing the district court opinion in *James v. Headley*,[170] the Fifth Circuit expressly rejected *Brinson*. See *James v. Headley*.[171]

Brinson and the decision on review in this case are based on the following assumptions:

(1) The right to counsel must be equated with the right to a jury trial;

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[165] Wyo. Crim. R. P. Rule 6 (1969 Supp.).

[166] *Supra*, n. 71.

[167] *Surpa*, n. 39.

[168] *Supra*, n. 60.

[169] 353 F.2d 106 at 109, n. 4 (5th Cir. 1965).

[170] 281 F. Supp. 588 (S.D. Fla. 1968).

[171] *Supra*, n. 8.

(2) Since both guarantees reside in the Sixth Amendment, the same standards must apply to both, and;

(3) The Federal Petty Offense Standard in 18 U.S.C. Section 1 and the Criminal Justice Act of 1964[172] limit the right to counsel to serious offenses in the federal system, thus the same result must be obtained in the state system.

Each of these points is without merit and is discussed below.

1. *The Right to Counsel Cannot Be Equated With the Right to a Jury Trial.*

Throughout the right to counsel decisions in *Gideon,*[173] *Massiah,*[174] *Miranda,*[175] *Escobedo,*[176] *Wade,*[177] *Gilbert,*[178] and *Coleman,*[179] there runs the thread of recognition that counsel is essential to protect the integrity of the fact finding processes at the trial itself.

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts (1967) commented:

> Counsel is needed to maintain effective and efficient criminal justice. Ours is an adversary system of justice, which depends for its vitality upon vigorous and proper challenges to assertions of governmental authority and accusations of crime. Reliance upon the judge or prosecutor to protect the interests of defendants is an inadequate substitute for the advocacy of conscientious counsel. Limiting the right to

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[172] 18 U.S.C. §3006A.

[173] *Supra,* n. 4.

[174] *Supra,* n. 19.

[175] *Supra,* n. 12.

[176] *Supra,* n. 20.

[177] *Supra,* n. 24.

[178] *Supra,* n. 25.

[179] *Supra,* n. 26.

> counsel 'greatly endangers judicial search for truth'." At pp. 52-53

The jury trial plays a different role in our system. It does not control the presentation of facts, but merely decides whether or not those facts constitute a violation of the law. The same role is played by judges in bench trials. Indeed, thousands of felony cases are tried each year in our courts without juries.[180] No claim can be made that these bench trials per se deny defendants a fair trial. Since *Gideon* there is no doubt that a felony trial without a lawyer (where there has been no waiver), is invalid on its face.

Indeed, the Court has noted "We would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that the defendant may never be as fairly treated by a judge as he would be by a jury. *Duncan v. Louisiana.*[181] But in *Gideon*, the Court did hold that every trial of a felony defendant without the benefit of counsel is unfair.

The Supreme Court of Minnesota, commenting on the analogy between counsel and jury trials wrote:

> But even though the two rights derive from the same provisions of the Federal Constitution, they are not of equal significance when it comes to the matter of obtaining a fair trial. It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law can adequately defend himself without the assistance of counsel. Consequently, we do not consider the cases involving the right to a jury trial controlling this area.[182]

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[180] In the calendar year 1970, in the Courts of Record, the Criminal Courts of Record, Civil and Criminal Courts of Record and Magistrate Courts in Florida, 1,880 cases were disposed of by jury trials, while 7,173 were non-jury cases. See *Sixteenth Annual Report, Judicial Council of Florida,* April 1971, Schedule F, p. 38.

[181] 391 U.S. 145, 148 (1968).

[182] *State v. Borst,* 154 N.W.2d at 894.

Nor has this Court placed the two guarantees on an equal plane. *Gideon* was made retroaction in *Pickelsimer v. Wainwright.*[183] But the right to a jury trial was not made retroactive. *DeStefano v. Woods.*[184]

Finally, it cannot even be flatly stated that the right to a jury trial is inextricably bound to a maximum punishment in excess of six months. In *Baldwin v. New York,*[185] the Court commented:

> Decisions of this Court have looked to both the nature of the offense stated, *District of Columbia v. Colts,* 282 U.S. 63 (1930), as well as of the maximum potential sentence, *Duncan v. Louisiana,* 391 U.S. 145 (1968), in determining whether a particular offense was so serious as to require a jury trial. In this case we decide only that a potential sentence in excess of six-months imprisonment is sufficiently serious of itself to take the offense out of the category of 'petty.'

2. *Even if Baldwin v. New York Presents an Inflexible Rule for Jury Trials, There Is No Authority To Support the Proposition That That Rule Governs All Sixth Amendment Guarantees.*

In addition to a jury trial and the right to counsel, the Sixth Amendment promises an accused (1) the right to a speedy trial; (2) the right to a public trial; (3) the right to know the nature and cause of the accusation; (4) the right to be confronted with witnesses against him; (5) the right to compel favorable witnesses to attend his trial.

It is inconceivable that any court would tolerate the limitations of those rights only to "serious offenses." In *In re Oliver,*[186] the Court made it clear that a public trial

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[183] 373 U.S. 2 (1963).

[184] 392 U.S. 631 (1968).

[185] 399 U.S. 66, 69, n. 6 (1970).

[186] *Supra,* n. 10.

was a basic guarantee to an accused "no matter with what offense he may be charged" and that the right to examine the witnesses against him, to offer testimony, *and to be represented by counsel* are essential to our system of justice.[187] (Emphasis supplied.)

Oliver had been summarily punished for contempt and faced a maximum penalty under Michigan law of sixty days imprisonment and a $100 fine. While the decision was reached on Fourteenth Amendment due process grounds it denotes a clear recognition that some Sixth Amendment rights are so fundamental that they are not subject to quibbling.

With the exception of the jury trial issue, this Court has never limited the application of Sixth Amendment guarantees to "serious offenses." The right to a speedy trial was guaranteed to a state defendant in *Klopfer v. North Carolina.*[188] *Barber v. Page,*[189] and *Pointer v. Texas,*[190] established the right to confront witnesses. *Washington v. Texas,*[191] secured a state defendant's right to compulsory process for obtaining witnesses. The right to an "impartial jury" was recently guaranteed to a misdemeanant. *Groppi v. Wisconsin.*[192] In no way did those decisions intimate that the results hinged upon the gravity or nomenclature of the the offense.[193]

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[187] *Id.*, at 273.

[188] 386 U.S. 213 (1967).

[189] 390 U.S. 719 (1968).

[190] 380 U.S. 400 (1965).

[191] 388 U.S. 14 (1967).

[192] ___U.S.___, 91 S.Ct. 490 (1971).

[193] Indeed, some Sixth Amendment rights have been carried over to non-criminal proceedings as an aspect of due process. Compare the need for confrontation and cross examination set forth in *Greene v. McElroy,* 360 U.S. 474 (1959) and see also, *Goldberg v. Kelly,* 397 U.S. 254 (1970).

3. *The Criminal Justice Act and the Right to Counsel.*

Title 18 U.S.C. §3006A, the Criminal Justice Act of 1964, established a method by which counsel could be compensated for representing indigent defendants in federal courts. In an early draft the Act provided for appointment and compensation of counsel for indigent defendants "in every criminal case in which the defendant appears without counsel."[194]

While the bill was changed later to exclude petty offenses under 18 U.S.C. §1, the change was not meant to limit the constitutional right to counsel, but merely to limit the cases in which counsel would be paid.[195]

The amended §3006A[196] provides for different means of providing representation, but it does not limit the right to counsel either.

Professor Dallin Oaks, upon whose report the Congress relied heavily in passing the new Act[197] wrote:

> The legislative history is clear on the reason for the exclusion of petty offenses from the Criminal Justice Act. The framers of the act did not doubt—

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[194] Report, Appendix II, "The Criminal Justice Bill: Text and Commentary" at 147.

[195] "The bill as passed by the Senate is restricted in scope to felonies and misdemeanors other than petty offenses. The House version of the bill would cover all criminal cases, including petty offenses .... *The constitutional mandate of the Sixth Amendment is without doubt applicable to petty offenses,* but it is the view of the conferees that adequate representation may be afforded defendants in such cases without the need for providing for compensation for counsel. In this way, money appropriated under the act will not be dissipated from the areas of greatest need, cases involving representation for crimes punishable by more than six months imprisonment." Conf. Rept. 1709, U.S. Cong. and Admin. News (88th Cong. 2nd Sess.) 1964 Vol. II, p. 3000. [Emphasis supplied.]

[196] Pub. L. 91-452, 84 Stat. 926, 1970.

[197] Oaks, "Report on the Criminal Justice Act in the Federal District Courts" (1969).

> although prominent courts do—that the Sixth Amendment right to counsel guarantees applied to misdemeanors and petty offenses as well as felonies. Rather, they excluded petty offenses as a matter of priority of expenditures . . .[198]

A close reading of the new act reveals that it was written so that it would encompass the inclusion of petty offenses, once this Court concluded they were within the Sixth Amendment for counsel purposes.[199]

This inclusion was not an oversight. It was made to provide flexibility so as to be able to incorporate what one subcommittee witness called "the progression of the extension of the right to counsel."[200]

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[198]U.S. Congress, Senate Committee on the Judiciary, Hearings Before the Subcommittee on Constitutional Rights, 91st Cong. Vol. 9 (extract from "Report on Criminal Justice Act") p. 328.

[199]18 U.S.C. §3006A(a) Choice of Plan—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for any person financially unable to obtain adequate representation (1) who is charged with a felony or misdemeanor (other than a petty offense as defined in Section 1 of this title) or with juvenile delinquency by the commission of an act which, if committed by an adult, would be such a felony or misdemeanor or with a violation of probation, (2) who is under arrest, when such representation is required by law, (3) who is subject to revocation of parole, in custody as a material witness, or seeking collateral relief, as provided in subsection (g), *or, (4) for whom the Sixth Amendment to the Constitution requires the appointment of counsel,* or for whom, in a case in which he faces loss of liberty, any Federal law requires the appointment of counsel. [Emphasis supplied.]

[200]Hearings Before the Subcommittee on Constitutional Rights, Op. Cit. p. 224, Testimony of Lawrence Speiser, Washington Director of the American Civil Liberties Union.

4. *The Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates and Their Impact on the Right to Counsel.*

On January 27, 1971, Rules of Procedure for the Trial of Minor Offenses Before Magistrates were promulgated by the Court.[201] The dissenting opinion by Mr. Justice Black, states that "by strong negative pregnant they [the rules] suggest there exists no right to jury trial or assigned counsel for 'petty offenses'."[202]

It is interesting to note that the new rules mark a severe departure from Rule 44 of the Federal Rules of Criminal Procedure. The Advisory Committee Note on that rule states:

> Like the original rule the amended rule [44] provides a right to counsel which is broader in two respects that that for which compensation is provided in the Criminal Justice Act of 1964: (1) *The right extends to petty offenses to be tried in the district courts,* and (2) the right extends to defendants unable to obtain counsel for reasons other than financial. [Emphasis supplied.]

If indeed Mr. Justice Black is correct, and the Court did intend to settle the issue of counsel through the new rules, then all is lost for the petitioner.

Hopefully, the rules do not stand for that proposition.

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[201] ___U.S.___, 39 U.S.L.W. 3330.

[202] 39 U.S.L.W. at 3331.

II. THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT REQUIRES THAT EVERY PERSON FACING INCARCERATION FOR THE COMMISSION OF AN OFFENSE, NO MATTER WHAT ITS DESIGNATION, IS ENTITLED TO BE ADVISED OF HIS RIGHT TO COUNSEL AND HAVE COUNSEL APPOINTED FOR HIM IF HE IS AN INDIGENT.

The issue presented in this case has typically been discussed in the context of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. But a strong equal protection thread runs through the theory of guaranteeing counsel to indigent defendants charged with offenses carrying penalties of less than six months.

Griffin v. Illinois[203] and *Douglas v. California*[204] present compelling equal protection arguments applicable to the counsel issue herein. In *Miranda v. Arizona*[205] the Court commented:

> Denial of counsel to the indigent at the time of interrogation while allowing an attorney to those who can afford one would be no more supportable by reason or logic than the similar situation at trial and appeal struck down in *Gideon v. Wainwright*, and *Douglas v. California*.[206]

That view is as valid in this case as it was in *Miranda*.[207] There is no doubt that the petitioner could have brought counsel to his trial if he could have afforded an attorney. Can he be denied counsel at that trial because he is indigent?

Since the right to counsel has been deemed a fundamental right, it cannot be denied to poor persons unless the state can

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[203] *Supra*, n. 11.

[204] 372 U.S. 353 (1963).

[205] *Supra*, n. 12.

[206] 384 U.S. 436 at 472-473.

[207] *Supra*, n. 12.

show a "compelling interest" in that classification. *Shapiro v. Thompson.*[208] The desire to save money is not sufficient to justify the exclusion of indigents from the right to be assisted by a lawyer.[209]

The so called "petty offenses" for which counsel is now denied in Florida have a far greater impact upon the poor than the rich. A conviction which sends a poor man to jail for even a few days has consequences which reach far beyond the loss of liberty. A poor man may well lose his job if he misses work for several days. The loss of a job may result in no income, thence eviction, repossession of furniture, welfare for his family, ad infinitum. The mind boggles at the possibilities which confront a poor man whose job (and life) depend upon his daily appearance at work.[210]

The poor man is not well qualified to conduct his own defense, to cross examine the witnesses against him and to invoke the rules of evidence. He, most of all, requires "the guiding hand of counsel at every step in the proceedings against him." *Powell v. Alabama.*[211]

If the kind of trial a man receives cannot be made to depend upon the amount of money he has, *Griffin v. Illinois,*[212] then *a fortiori* counsel must be provided for poor

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[208] *Supra,* n. 13.

[209] "The saving of welfare costs cannot justify an otherwise invidious classification." *Shapiro v. Thompson, supra,* n. 13 at 633.

[210] Cf. *Baldwin v. N.Y.,* 399 U.S. 66, 73 (1970) and *Marston v. Oliver,* 8 Cr. L. Rptr. 2457 (D.C. E. Va. March 10, 1971).

[211] 287 U.S. at 69. The impact of counsel is apparent from a study made of the City of Miami Municipal Court in 1967. Approximately two-thirds of the defendants with counsel did not go to jail, while over three-fourths of the unrepresented were incarcerated. Menninger, *The Crime of Punishment,* Viking Press, N.Y. 1968 at p. 52-53.

[212] *Supra,* n. 11.

people in cases where a monied man can, and would be represented.[213]

III. EXTENDING THE RIGHT TO COUNSEL TO ALL WHO FACE THE LOSS OF LIBERTY WOULD BENEFIT OUR JUDICIAL SYSTEM.

Although ARGERSINGER faced a maximum punishment of six months incarceration, he urges that the issue presented must be decided in the broader framework of a defendant facing a loss of liberty for any period of time.

For if the court decides this case only in the context of the punishment to which ARGERSINGER was exposed, it will open the flood gates for litigation posing the right to counsel issue in 175-day cases, or 150-day cases and so on until a firm guideline is set.

Such a result is already clear from the plethora of habeas corpus cases brought in Florida seeking to establish a definitive standard. In one jurisdiction a court attempted to set a guide of 90 days or a $500 fine, only to see the city council reduce the maximum penalty to 75 days or a $450 fine in an effort to escape the effect of the decision. Thus the litigation continues.[214]

Clearly no valid consitutional basis exists for holding that the right to counsel is required in a 90-day case, and not necessary in a 75-day or 30-day case. As shown above, no practical purpose is served by augmenting such rules.

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[213]There is some data to support the conclusion that even the rich choose to proceed without counsel in some types of cases. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash. L. Rev. 685, 713-714 (1968). This would also butress the argument for reclassification of offenses according to the actual threat of imprisonment discussed in Part III of this brief.

[214]See, *Wooley v. Consolidated City of Jacksonville*, 433 F.2d 980 (5th Cir. 1970) upholding the district court decision setting a 90-day or $500 fine rule. Then see McRae, *The Administration of Justice in Federal Courts*, 23 U. Fla. L. Rev. No. 2, (at Appendix) (to be published May, 1971).

The reluctance to extend counsel arises from a fear that jaywalkers, sidewalk spitters and overtime parkers will demand lawyers, grinding our judicial system to a halt. *Argersinger v. Hamlin.*[215] Carried to their logical extremes, those fears are sobering, but that argument is actually specious. For it assumes that state and local governments will, of their own paralysis, fail to take actions which would make a constitutional decision workable.

A similar argument was advanced in opposition to *Gideon.*[216] But the states, especially Florida, responded with appropriate legislation and financing to make the *Gideon* mandate a reality.

There are solutions available should the court make the right to counsel applicable to all defendants who face a loss of liberty. In fact some of these solutions may bring about the long needed judicial reform urged by President Nixon in his address to the National Conference on the Judiciary in Williamsburg, Virginia on March 11, 1971. He said:

> What can be done to break the logjam of justice today, to insure the right to a speedy trial—and to enhance respect for the law. We have to find ways to clear the courts of the endless stream of 'victimless' crimes that get in the way of serious consideration of serious crimes. There are more important matters for highly skilled judges and prosecutors than minor traffic offenses, loitering and drunkeness.[217]

The most workable solution would be to reclassify offenses so that the actual threat of punishment would be realistically stated.

Many offenses or crimes do not *actually* carry the threat of jail as punishment. While the ordinance or statute might specify a potential jail sentence, in practice, offenders are

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[215] *Supra*, n. 71.

[216] *Supra*, n. 4.

[217] New York Times, March 12, 1971, p. 18.

not incarcerated for their violations. The best examples are jaywalking, sidewalk spitting and overtime parking. Unless a defendant is a scofflaw, he is not going to be jailed for such offenses. Nor will he be for mere traffic offenses unless he has an extremely bad driving record or has engaged in some type of aggravated driving misconduct.[218]

Once the appropriate legislative body designated the offenses which should actually carry jail potential, computers or court personnel could process those cases into an adversary division of the court where defendant's counsel would be available. The other cases, which might carry only a fine, could be processed in a non-adversary manner, possibly even by non-judicial personnel.

Reclassification can serve a secondary purpose of saving court time and police officers' time.[219]

The reclassification procedure advocated would merely reflect the actual community standards about the seriousness of offenses. It is consistent with what the ABA's Project on Minimum Standards for Criminal Justice, Standards Relating to Providing Defense Services, Section 4.1 (tentative draft, 1967) called for:

[218] For instance, in New York in 1969, 1,803.049 people were convicted of violations including jaywalking and speeding and other traffic infractions. Of this number a total of forty (40) persons were fined and imprisoned, given a suspended sentence, or incarcerated or sent to a reformatory. Source: *Criminal Court of the City of New York Annual Report of 1969*, p. 13, Table 3, line 11. The same table, at line 20, reflects that of the 18,615 convictions of vehicular misdemeanors: driving while intoxicated, reckless driving, leaving the scene of an accident, 332 or 1.8% were incarcerated in some way.

[219] *1970 Annual Report, Metropolitan Court, Dade County, Florida,* reflects at page 35 that 21,489 speeding arrests were made by the Dade County Public Safety Department in the greater Miami area in 1970. 51 of these cases involved accidents. A total of 15,372 persons entered guilty pleas. Assuming that each guilty plea and its disposition took only three minutes, a total of 46,116 minutes, or over ninety-six eight-hour work days, were spent in 1970 by the judges and police officers in Metropolitan Court accepting guilty pleas from speeders.

> Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, *except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors or otherwise.* (Emphasis supplied.)[220]

The Sixth and Fourteenth Amendments of the Constitution demand, at the least, the adoption of this standard.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court to hold that persons charged with offenses which may result in a loss of liberty are entitled to be

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[220] Compare the discussion in Kamisar and Choper, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 Minn. L. Rev. 1, 62-84 (1963). And see especially, Junker, *The Right to Counsel in Misdemeanor Cases*, 43 Wash. L. Rev. 685, 708-715 (1968). Also, *Misdemeanor's Right to Counsel: Imprisonment Standard*, 21 U. Fla. L. Rev. 421, 424-425 (1969). Note that some jurisdictions have in effect reclassified offenses, limiting the punishment to fines only. *Tate v. Short*, ___U.S.___, 91 S.Ct. 668, 669 n. 2 (1971).

advised of their right to counsel, and to have counsel appointed if they are indigent. The Petitioner requests that the decision of the Florida Supreme Court be reversed and his conviction vacated.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-5015 (5798)

JON RICHARD ARGERSINGER,

Petitioner,

-vs-

RAYMOND HAMLIN,

Respondent.

On Writ of Certiorari to the
Supreme Court of Florida

BRIEF OF RESPONDENT

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BRIEF OF RESPONDENT

OPINION BELOW

The opinion of the Florida Supreme Court which is subject matter of this appeal, is reported at 236 So.2d 442.

JURISDICTION

This Court has jurisdiction pursuant to the provisions of 28 U.S.C. §1257(3).

QUESTION PRESENTED

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL TO REPRESENT AN INDIGENT DEFENDANT CHARGED WITH A "PETTY OFFENSE" IN A STATE COURT.[1]

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved in this case, to-wit: the Sixth and Fourteenth Amendments are reproduced in Petitioner's brief and will not be repeated herein.

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1. The Respondent has rephrased the issue since the parties agreed in the Florida Supreme Court that the offense was a petty offense. The Petitioner asserted that he was entitled to counsel appointed to represent him notwithstanding the fact that he was charged with only a petty offense. Even the main brief filed herein considers the charge as a petty offense for counsel candidly admits that if this Court meant to settle the issue by adoption of the Rules of Procedure for the Trial of Minor Offenses Before Magistrates "...then all is lost for the petitioner..." (brief at page 35)

STATEMENT OF THE CASE

The statement of the case as set forth on page three and four of Petitioner's brief is acceptable to the Respondent except the Respondent wishes to note that it was affirmatively alleged that Petitioner was above average intelligence and fully capable of understanding the nature, quality and consequences of his acts. (App. 5, par.VII) This allegation was never contradicted or denied by Petitioner and thus must be assumed as true. Moreover, it was not alleged by Petitioner that he was not advised of his right to retained counsel. (App. 2) It was conceded that he was not advised of his right to appointed counsel. The fact that the record is silent can be of no benefit to Petitioner for the State announced, in open court, before the Florida Supreme Court that there was a violation of Boykin v. Ala., 395 U.S. 238 (1969), but Mr. Shea orally waived that deficiency in order to obtain a resolution of the issue presented to this Court. Indeed, he was asked by the court whether he had authority to waive the defect and he assured the court that he did. Accordingly, he cannot now seek to use the absence of a record to his benefit, either directly or indirectly.

QUESTION PRESENTED

WHETHER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION REQUIRE THE APPOINTMENT OF COUNSEL TO REPRESENT AN INDIGENT DEFENDANT CHARGED WITH A "PETTY OFFENSE" IN A STATE COURT.

ARGUMENT

The Florida Supreme Court held there was no absolute organic right to appointed counsel for indigents charged with a "petty offense" thereby rejecting the position advanced by the Petitioner to-wit: that counsel must be appointed whereever there may be "involuntary incarceration for 10, 20, 30 or 60 days." The Florida Supreme Court, at the urging of Respondent, receded from the misdemeanor-felony dicotomy upon which their prior decisions rested--Fish v. State, Fla. 1964, 159 So.2d 866, and held that in instances where the maximum penalty authorized was six months or less appointed counsel was not required. The Court did not conclude that a trial judge lacked authority, in the exercise of his discretion, to appoint counsel to represent an indigent person where the nature of the charges and/or the education, experience and ability of the accused is such that he is incapable of understanding or appreciating the nature

thereof or presenting an intelligent defense thereto. That was unnecessary to a disposition of the case since there were no allegations by Petitioner that he was unable to understand the nature of the charges against him.

The Supreme Court, in the opinion presently being reviewed, adopted the reasoning and conclusions expressed by Judge Mehrtens in Brinson v. State, S.D. Fla. 1967, 273 F.Supp. 840. Judge Mehrtens in Brinson, supra, in an exhaustive treatment of the issue, stated:

> "...The Supreme Court, in Gideon v. Wainwright,has explicitly receded from the view that right to counsel depends upon the particular circumstances of any case. The facts of the Gideon case, however, as noted by Mr. Justice Harlan, 372 U.S. at 351, 83 S.Ct. 792, 9 L.Ed 2d 799, did not require determination of whether the rule should extend to all criminal cases. Therefore it is doubtful whether Evans v. Rives compelled the Fifth Circuit in Harvey to hold that a 'serious offense' distinction could not be applied after Gideon to state charges not denominated felonies. Harvey may be limited because of the particularly flagrant circumstances involved in the case. A literal reading of the opinion, however, would indicate that the possibility of even a ninety-day

jail sentence is a sufficient deprivation of liberty to run afoul of due process unless defendant is given assistance of counsel.

"In a very similar case involving a Florida misdemeanor charge, McDonald v. Moore, 353 F.2d 106 (5th Cir. 1965), Judge Jones speaking for the court stated that 'this Court has, we think, rejected the "serious offense" rule. We also think that Gideon has repudiated the Betts v. Brady ad hoc special circumstances rule ***' Id. at 110. Being of the opinion that Harvey controlled the decision due to the similarity of the facts, the McDonald case was decided purely on the basis of stare decisis. The court, however, did not have the benefit of the Supreme Court's decision in the Gault case. It is now evident from Gault that the seriousness of the offense charged has direct bearing on the constitutional right to counsel.

"Accordingly, this Court holds that the constitutional right to counsel in non-felony cases depends upon the maximum possible penalty under the offense charged, this being the test whether or not a 'serious offense' is involved. In order that rights of

constitutional statute be uniformly applied, I hold that the minimum offense for which counsel must be provided is one which carries a possible penalty of more than six months imprisonment, which is the line of demarcation drawn in federal practice. In this case, Brinson's second and third conviction of leaving the scene of an accident involving personal injuries must be invalidated since the court failed to notify the defendant of his right to the assistance of counsel.

"This Court has not overlooked the contention that if the right to counsel is extended beyond the holding of Gideon to any misdemeanor, that a fortiori the right must be extended to all misdemeanors. The right to counsel should not be treated as an abstract theorem, but rather as a means for achieving the most perfect justice possible in a given situation. The essence of the right is to protect those charged with crimes from wrongful conviction. However, that right is qualified by practical exigencies.

"If Gideon is extended to all misdemeanors, its effect would be profound and create a tremendous economic and administrative burden since only a small minority of states now require appointment of

counsel for indigents in misdemeanor cases. The demands upon the bench and bar would be staggering and well-nigh impossible. Such a construction could lead to the appointment of counsel for misdemeanors not normally considered criminal, such as overparking and other petty traffic offenses, jaywalking, dropping trash upon the sidewalk, and like offenses. Further, to hold that the right to court-appointed counsel exists in all misdemeanor cases would in effect also be to hold that the portion of the Criminal Justice Act relating to petty offenses is unconstitutional, since surely the federal courts must be held to the same standards they impose upon the state courts under the Sixth and Fourteenth Amendments..."

"...The right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right, nor are any of the rights guaranteed by the Constitution 'absolute.' See Creighton v. State of North Carolina, 257 F. Supp. 806 (E.D.N.C. 1966). As stated in that case, the Constitution was not written to provide an exercise in abstract idealism but as a practical guide for the management of the affairs of this country and the protection of the rights of its citizens. In today's complex society there can be no

truly 'absolute' rights. Thus, the right to free exercise of the religion of one's choice is on its face absolute, but in application is limited since a religion requiring illegal activities would not be constitutionally protected. One cannot refuse to pay taxes because of religious scruples, nor can one engage in polygamy or any other practice directly harmful to the safety, morals, health or general welfare. West Va. State Board of Education v. Barnette, 319 U.S. 624, 63 S. Ct. 1178, 87 L.Ed. 1628 (1942); Late Corporation of the Church of Jesus Christ of Latter Day Saints v. United States, 136 U.S. 1, 10 S.Ct. 792, 34 L.Ed. 478 (1889); Reynolds v. United States, 98 U.S. 145, 25 L.Ed. 244 (1878). The 'absolute right' to free speech has been qualified and curtailed by libel and slander laws. Such right, on occasion, must be subordinated to other values and considerations. Dennis v. United States, 341 U.S. 494, 71 S.Ct. 857, 95 L.Ed. 1137 (1950). It does not confer the right to persuade others to violate the law. Bullock v. United States, 265 F. 2d 683 (6th Cir. 1959); cert. den., 360 U.S. 909, 79 S.Ct. 1294, 3 L. Ed. 1260. Neither does such right preclude Congress from excluding obscene matter from the mails or from punishing persons advocating

> overthrow of the government by force. United States v. Bryan, 83 U.S. App. D.C. 127, 167 F.2d 241; cert. den. 334 U.S. 843, 68 S.Ct. 1511, 92 L.Ed. 1767. Likewise, the 'absolute right' to counsel in all criminal prosecutions must be qualified by practical exigencies and, unless this is done, the necessities of sound judicial adminstration would be disregarded and the administration of justice thrown into senseless chaos." (Emphasis supplied)

The same conclusions have been reached by other courts which have dealt with this issue. State v. DeJoseph, Conn.App. 1966, 222 A.2d 752, cert. den. 385 U.S. 982; Cableton v. State, Ark. 1967, 420 S.W.2d 534; Hendrix v. City of Seattle, Wash. 1969, 456 P.2d 696, cert.den. 397 U.S. 948 (1970); State v. State Dept. of Health and Social Services, Wis. 1968, 155 N.W.2d 549; MacDonnel v. Commonwealth, Mass. 1967, 230 N.E.2d 821; Burrage v. Superior Court, Ariz. 1969, 459 P2d 313; Hortencio v. Fillis, Utah 1970, 475 P.2d 1011 (1970); Newell v. State, Me. 1971, 277 A.2d 731; Wall v. Purdy, S.D.Fla. 1971, 321 F.Supp. 367 (1971); cf. Winters v. Beck, D.C.Ark. 1968, 281 F.Supp. 793, aff'd Beck v. Winters, 8th Cir. 1969, 407 F.2d 125.

In Wall v. Purdy, supra, Judge Mehrtens reaffirmed the position he espoused in Brinson, supra, and correctly observed that the "federal courts cannot and should not

require more from the state courts than the federal government itself has determined it will provide..." 321 F.Supp. at 373-74. Judge Mehrtens referred to the fact that the Criminal Justice Act of 1964 (18 U.S.C. §3006 A) as amended, contemplated the appointment of counsel in felony or misdemeanor cases but not in cases falling within those classed as petty offenses. 321 F.Supp at 373. A petty offense, as defined by 18 U.S.C. §1(3) is "[a]ny misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both,..."[2]

Judge Mehrtens reviewed the decisions emanating from the Court of Appeals, Fifth Circuit, and like the Florida Supreme Court, noted the Court of Appeals has "neither clarified the question...nor been of any real assistance to the trial courts, both federal and state, which are constantly besieged and beset with this problem..." 321 F.Supp. at 372 The Fifth Circuit Court of Appeals in Harvey v. State of Mississippi, 5th Cir. 1965, 340

2. The amount of the fine is irrelevant when dealing with the right to counsel for indigents because the defendant is unable to pay the fine and imprisonment in lieu of payment thereof cannot legally exceed the period of authorized imprisonment. Tate v. Short, 401 U.S. 495 (1971)

F.2d 263, refused to apply the "petty offense" theory on the grounds that there was no authority to distinguish between a "serious offense" and a "petty offense", but has since required the appointment of counsel in all cases where the defendant faces a possible 90 day imprisonment or a $500.00 fine. James v. Headley, 5th Cir. 1969, 410 F.2d 325; Wooley v. Jacksonville, 5th Cir. 1970, 433 F.2d 980, cert. pending; and Alvis v. Kimbrough, 5th Cir. 1971, ___F.2d____, Opinion filed July 8, 1971, not yet reported. Thus the Court of Appeals, Fifth Circuit, has recognized the "petty offense" doctrine but has drawn the line at 90 days rather than six months. Implicit in such holdings is a recognition that the right to counsel is not absolute and the dispute reduces itself to where the line should be drawn.

The Respondent suggests it should be drawn at six months which would be consistent with the line selected by the United States Congress, the majority of courts that have considered the question and the line drawn by this Court in Baldwin v. New York, 399 U.S. 66 (1970), in determining when the Sixth Amendment right to trial by jury was required. Respondent fails to understand how it could be legally argued that one standard should govern the right to a jury trial but a different standard should be used to determine the right to appointed counsel. The Sixth Amendment makes no such distinction and the right to counsel and trial by jury are both secured by that same provision. If the Sixth Amendment right to trial by

Jury does not apply to a "petty offense" case and the decisions of this Court clearly hold it does not, Duncan v. Louisiana, 391 U.S. 145 (1968); Baldwin v. City of New York, supra, the right to counsel guaranteed by that same amendment should not be applicable. Beck v. Winters, supra. In that case the Eighth Circuit Court of Appeals, observed:

> "It should be remembered that the Sixth Amendment makes no differentiation between misdemeanors and felonies. The right to counsel is not contingent upon the length of the sentence or the gravity of the punishment. Rather, it provides that the guarantee extends to 'all criminal prosecutions.' Furthermore, we note that the phrase 'all criminal prosecutions' applies not only to the right to counsel but also to the right to a jury trial. Logically the phrase should be accorded the same meaning as applied to both protections. Thus we believe significant the Supreme Court's pronouncements in cases involving the jury trial guarantee." (Emphasis added)

See also: Wall v. Purdy, supra, at page 372. Indeed in Baldwin, supra, this Court held a "petty offense" is not a "criminal prosecution" within the meaning of the Sixth Amendment and it seems from that alone counsel would not be required since the right to counsel applies only to criminal proceedings.

In Newell v. State, supra, the Supreme Court of Maine,after noting this Court's recent adoption of the Rules of Procedure for the Trial of Minor Offenses before Magistrates issued on January 27, 1971 (39 L.W. 3330) concluded:

> "We are convinced that the time has come when due process demands that we abandon the felony-misdemeanor distinction as a basis for appointment of counsel and construe our own constitution to require appointment of counsel for needy persons charged with serious misdemeanors, unless waived.
>
> "Our statutes define 'felony' as including every offense punishable by imprisonment in the State Prison. 15 M.R.S.A. §451. We know that the distinction between misdemeanors and felonies is often only a convenient method of classification with little real significance and that in many instances the maximum possible confinement in a County Jail provided by a statute for some misdemeanors may be only 30 days shorter than the minimum period of imprisonment in our State Prison provided for most felonies. Using the category titles of felony and misdemeanor in determining right to counsel is particularly unconvincing in this state where 34 M.R.S.A. §802 provides that any male between the age of 17 and 26, upon conviction of any misdemeanor which is punishable by imprisonment in

the county jail (as most are), may be committed to the Men's Correctional Center for an indeterminate period which can last as long as three years. 34 M.R.S.A. §853 makes a similar provision for sentence to the Women's Correctional Center of women between the ages of 17 and 40. These people, although charged with misdemeanors, face possible confinement for longer terms than can be imposed on convictions of at least one felony. 17 M.R.S.A. §3152.

"The defense of many misdemeanor charges may demand professional assistance as urgently as that of many felony trials and may result in loss of liberty. While no loss of liberty can be considered trivial, it seems to us that the individual's need for legal assistance must be weighed carefully against society's ability reasonably to furnish it.

"We know that during this century the legislature has created a great many new misdemeanor offenses which are of relatively minor nature, such as some traffic and fish and game violations, for example. Many thousands of such violations come before our District Courts yearly and we are convinced that to extend the obligation to provide counsel to minor charges

of these types would impose a presently insupportable burden upon the court system and the bar with a seriously adverse effect upon all litigants' rights to prompt attention to their problems in the courts. No right is absolute and a fair standard must be found upon which to balance the public interests and the individual's rights under due process.

"We conclude that this balance can best be achieved by distinguishing between petty and serious misdemeanors using as a satisfactory guideline the rules that the United States Supreme Court saw fit to prescribe only three months ago. We consider that the distinction between 'petty' and 'serious' satisfies the demands of due process and that it serves a proper governmental purpose and achieves a reasonable balance of the public interests and the individual's rights to the satisfaction of the equal protection clause.

"Therefore, we hold that all indigent persons who are without attorneys and who are facing criminal charges which might result in the imposition of a penalty of imprisonment for a period of more than six months or a fine of more than $500 or both (including those persons subject to potential confinement in either the Men's or the

> Women's Correctional Center) must be informed by the Court of their right to appointed counsel and must have such counsel appointed unless they waive this right."

The Respondent agrees with the foregoing except with respect to the amount of the fine determining the right to counsel since it is irrelevant to an indigent (see Footnote 2), and urges that this Court hold an indigent is not entitled to appointed counsel as a matter of right in those cases where the maximum period of authorized confinement is six months or less, unless, of course, the nature of the charge itself prevents it from being considered "petty" notwithstanding the punishment authorized. This does not mean the trial courts would not be authorized and indeed, in some instances, required to appoint counsel because of "special circumstances." In "petty offense" cases the courts should exercise discretion and should appoint counsel where the circumstances and justice requires it. State v. DeJoseph, supra; MacDonnel v. Commonwealth, supra; State v. State Dept. of Health and Social Services, supra; and Winters v. Beck, supra.

The adoption of this position would not collide with the prior decisions of this Court rendered in Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); or In Re Gault, 387 U.S. 1 (1967), for every one of those cases involved "serious" felonies imposing a death penalty or extensive periods of

incarceration. Due process required the appointment of counsel in those cases. It does not require it in cases involving petty offenses.

The Petitioner makes much of the fact that counsel should be provided in petty offenses since the defendants in those cases, as in all others, face "the awesome prospect of incarceration." This argument is indeed appealing on its face. However, an examination of the actualities of our criminal justice system discloses that the argument lacks substantial merit in fact. Respondent would direct the Court to page 40, footnote 218, of the Petitioner's brief, which reads as follows:

> "For instance, in New York in 1969, 1,803.049 people were convicted of violations including jaywalking and speeding and other traffic infractions. Of this number a total of forty (40) persons were fined and imprisoned, given a suspended sentence, or incarcerated or sent to a reformatory. Source: Criminal Court of the City of New York Annual Report of 1969, p. 13, Table 3, line 11. The same table, at line 20, reflects that of the 18,615 convictions of vehicular misdemeanors: driving while intoxicated, reckless driving, leaving the scene of an accident, 332 or 1.8% were incarcerated in some way."

What this table discloses is that in New York for the year 1969 slightly more than twenty-thousandths of one percent of those persons charged with minor offenses, including traffic offenses up to speeding violations, were ever incarcerated in any manner. Even more importantly, the same table reflects that a mere 1.8% of those persons charged with the more serious offenses of driving while intoxicated and reckless driving were ever incarcerated in any way. Surely, based upon these allegedly representative statistics, it would appear that the possibility of anyone charged with a petty offense ever actually receiving any incarceration is covered by the principle of lex non curat de minimis. Your Respondent would suggest that based upon these figures, the prospect of incarceration could hardly be determined "awesome."

Petitioner argues in the alternative that the Equal Protection Clause of the Fourteenth Amendment requires the appointment of counsel to indigent defendants in petty offense cases since the state allows solvent defendants to appear through counsel in these cases. Respondent notes that this argument was not raised by Petitioner in the Florida Supreme Court and was therefore not passed upon by that tribunal. Counsel for Petitioner candidly acknowledges this deficiency. (See Petitioner's brief

at page 36). The law is clear that this Court will not decide federal constitutional issues raised for the first time on review of state court decisions and that this Court has no jurisdiction unless said federal question was raised and decided in the state court below. This principle was reaffirmed in the recent case of Cardinale v. La., 399 U.S. 437 (1969). Inasmuch as this issue was not presented to the Florida Supreme Court and was not passed upon, Petitioner may not raise it before this Court.

Alternatively, Respondent maintains that if this argument is true, then the state actually should be required to appoint counsel in all types of law suits since in all types of law suits solvent defendants are allowed to appear through counsel. Taken to its logical conclusion, acceptance of Petitioner's position in this regard would be to constitutionally require "socialized litigation" or "judicare." In almost every type of legal or administrative proceeding, persons who desire to be represented by counsel are allowed to do so. If in every instance where the state allows solvent defendants to appear through counsel (even though the person may well be squandering his money), the state then has the constitutional obligation to appoint counsel to those who allege they could not afford same, then indeed "judicare" has come.

Petitioner may attempt to state that his position is different from other defendants since he faces the prospect of incarceration but it is submitted your Respondent has already demonstrated through the Petitioner's own statistics, the *di-minimis* nature of that argument. Moreover, in other cases where this Court has held, under the equal protection clause, that counsel need not be appointed, the harm facing the litigant can certainly be described as no less harsh than those facing Petitioner, to-wit: the funds which the litigant needs for he and his family to continue living. See Goldberg v. Kelly, 379 U.S. 254 (1970). The same might be said of the indigent civil defendant faced with a foreclosure action on his home. This Court has already announced as a matter of constitutional principle that where due process is involved "labels" do not count. In Re Gault, supra. Certainly, in the above-mentioned instances of "civil" litigation, the awesome consequences facing the indigent litigant were no less, nay, they were much more, than the consequences facing this allegedly indigent litigant.

Moreover, equal protection must be afforded to all regardless of whether the proceedings are "civil" or "criminal". Petitioner is suggesting that equal protection requires appointment of counsel to indigents in any case where the state or federal government allows a solvent defendant to appear through counsel. There is no authority to support such a proposition. Indeed, this Court's decision in Sanders v United States, 373 U.S.

1 (1963), decided the same day that Gideon was decided, stands as authority to the contrary, for there it was clearly indicated that the appointment of counsel in a habeas corpus proceeding is discretionary, and lower federal courts have so held. LaClair v. U. S., 7th Cir 1967, 374 F.2d 486; Roach v. Bennett, 8th Cir. 1968, 392 F.2d 743 and the cases cited in footnote 3 at p. 748; and Queor v. Lee, 5th Cir. 1967, 382 F.2d 1017. Respondent, however, knows of no prohibition against a petitioner in habeas corpus from appearing through retained counsel.

Respondent urges that due process does not require the appointment of counsel in petty offense cases and that if due process is satisfied then equal protection is likewise satisfied. To require that counsel be at least offered to an indigent in every case would amount to inverse discrimination against solvent individuals. This is so because every indigent would accept the services regardless of the value thereof since he does not have to personally bear the expense. The solvent defendant, on the other hand, would continue to make a practical decision of whether he would be better off to pay the fine than to pay an attorney's fee and the fine. The end result is that all indigents would have counsel in every instance whereas solvent persons charged with petty offenses would frequently appear without the benefit of counsel. Respondent respectfully submits that such a condition would not be equal protection of the law. Cf. Williams v. Illinois, 399 U.S. 235 (1970).

CONCLUSION

For the reasons stated herein and upon the authorities cited, Respondent urges that the decision of the Florida Supreme Court be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Respondent has been forwarded, via U. S. Mail, to

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F. ROBERT SEAVER,

Supreme Court of the United States

October Term

70-5015

~~No. 5796~~

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF COMMONWEALTH OF VIRGINIA AMICUS CURIAE

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Supreme Court of the United States

October Term

No. 5798

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

On Writ of Certiorari to the Supreme Court of Florida

BRIEF OF COMMONWEALTH OF VIRGINIA AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The question presented for review in this appeal is whether due process requires the appointment of counsel for indigent persons in misdemeanor cases. The Supreme Court of Florida, from whose decision this appeal is taken, ruled that an indigent defendant must be advised of the right to court-appointed counsel in any case in which incarceration for more than six months would be possible upon conviction. Since the laws of the Commonwealth of Virginia do not provide for the appointment of counsel as a matter of right in misdemeanor cases, and since the majority of misdemeanor offenses in the Commonwealth carry potential jail terms of more than six months, the issues

presented in this case are of great importance to the people of Virginia.

ARGUMENT

It is the intention of the Commonwealth of Virginia as *amicus curiae* to stress to this Court the potential effects on the various States of the enunciation of a rule requiring the appointment of counsel by the State for indigent defendants in all misdemeanor cases where the possibility of incarceration exists. The most obvious effect, of course, would be upon the orderly and efficient administration of justice, since it can be anticipated that implementation of such a rule would mean more attorneys in more cases, which in turn would mean more time involved not only in the trial itself but in the setting of cases for trial, motions for continuance, appeals, habeas corpus actions (alleging, of course, ineffective counsel), etc. The use of law students and paralegal personnel, as suggested by petitioner, might alleviate such problems as they relate to any scarcity of lawyers, but would do nothing for the courts, clerk's offices, policemen, and other witnesses who would be required to spend more time than they already do now in over-crowded courts.

These obvious considerations, however, only scratch the surface of the problem. Petitioner insists that the bugbear of jammed dockets and foot-dragging justice is more apparent than real because many offenses do not *actually* carry the threat of imprisonment. It is true that some offenses such as jay-walking or sidewalk spitting either specify no jail term as punishment or if they do, such terms are rarely if ever imposed in lieu of or in addition to a small fine. Petitioner suggests that state legislatures and local governments could reclassify all such offenses to sort out those in which jail would not be a possibility, and that once this was done

the non-jail-potential cases could be processed separately from those requiring the presence of an attorney. Petitioner suggests further that the fine-only cases could be handled by non-judicial personnel.

These suggestions seriously overlook important practical considerations. Firstly, persons charged with traffic offenses which may result in loss of a driver's license or higher insurance rates quite often engage the services of counsel to fight the charges or simply to stall conviction for as long as possible. These cases cannot be handled either for the state or for the defendant by non-judicial personnel who are not lawyers. More importantly, however, many states still provide by statute for incarceration for nonpayment of a fine, and indeed, the threat of incarceration is as a practical matter the only realistic method for the enforcement of small fines, *Tate* v. *Short*, 401 U.S. 395 (1971) notwithstanding. That case held only that an *indigent* may not be *immediately* imprisoned for non-payment of a fine. It did not hold that a non-indigent scofflaw may not be jailed, nor did it prohibit the incarceration of any person of whatever solvency after alternative opportunities had been extended. While Virginia (as have presumably all of the States) has developed procedures for alternative methods of payment in the wake of *Tate* v. *Short, supra*,[1] any state which retained its jail-for-nonpayment statute would be hard pressed to argue that no possibility of incarceration exists in what might otherwise appear to be a fine-only case. Thus, the petitioner's suggestion for reclassification would require one further step, which he has either failed to anticipate or failed to suggest: repeal of the jail-for-nonpayment statutes. It cannot be doubted that such a step would result in a significant increase in the number of judgment-proof scofflaws.

From the foregoing it should be clear that only by accepting the principle that no offense can be considered petty, and that a day in jail is as long as a lifetime, can a rule requiring the appointment of counsel in every case where the threat of incarceration exists be justified, in view of the considerations outlined above which *must* result from such a rule. Indeed, this Court's Rules of Procedure for the Trial of Minor Offenses Before Magistrates, 400 U.S. 1037, promulgated January 27, 1971, make clear that some offenses are "petty" as opposed to "minor" and indicate that the appointment of counsel is not to be required in such cases. These petty offenses are those in which the maximum incarceration is six months.

Moreover, there are significant reasons for not tying the right to appointed counsel to any particular length of potential incarceration. It is respectfully submitted that the proper criterion should be the consequences of conviction rather than the possibility of jail, or in other words, misdemeanors as opposed to felonies. It is further submitted that while such civil disabilities as loss of the right to vote, disqualification from government service, etc. normally attach to felony convictions, no such consequences attach *by operation of law* to misdemeanor convictions. It may certainly be true that, as petitioner suggests, a poor man who goes to jail for more than a few days may lose his job, but he is just as likely to lose his job by reason of illness, strike, bankruptcy of his employer, or any of several other possibilities. To say that the state has deprived a man of his job because it sent him to jail is quite a stretch of the Constitution.

The reason for stressing this distinction is that different States have different maximum limits on punishment for misdemeanors, which in a majority of cases are or may be

longer than six months. A survey of the general misdemeanor statutes (punishment limits where not specifically provided by another statute) of the fifty States discloses the following maximum jail terms:

More than one year (3): Louisiana (two years);[2] New Jersey (three years);[3] North Carolina (two years).[4]

One year (20): Alaska,[5] Arkansas,[6] Colorado,[7] Georgia,[8] Illinois,[9] Iowa,[10] Kansas,[11] Kentucky,[12] Maine,[13] Missouri,[14] New York,[15] North Dakota,[16] Oklahoma,[17] Oregon,[18] Rhode Island,[19] South Dakota,[20] Tennessee,[21] Virginia,[22] Washington,[23] Wisconsin.[24]

Six months (9): Alabama,[25] Arizona,[26] California,[27] Idaho,[28] Mississippi,[29] Montana,[30] Nevada,[31] New Mexico,[32] Utah.[33]

Ninety days (4): Florida,[34] Michigan,[35] Minnesota,[36] Wyoming.[37]

Sentence in discretion of court (4): Delaware,[38] New Hampshire,[39] South Carolina,[40] West Virginia.[41]

No jail term authorized (2): Connecticut,[42] Hawaii.[43]

No general misdemeanor statute (8): Indiana, Maryland, Massachusetts, Nebraska, Ohio, Pennsylvania, Texas, Vermont.

It will be seen from this analysis that 27 states have statutes providing for possible incarceration of more than six months, and the same possibility may exist in the eight states which do not define misdemeanors in terms of maximum punishment.

CONCLUSION

It is respectfully submitted that unless and until misdemeanor convictions *per se* result in consequences to the individual growing out of the conviction itself, rather than out of the subjective circumstances of each defendant's life, the

right to court-appointed counsel should not attach, for the reasons stated heretofore.

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CERTIFICATE OF SERVICE

I certify that on or before the 8th day of September, 1971, I mailed by Airmail three copies of the foregoing Brief to J. Michael Shea, Esquire, P.O. Box 2742, Kennedy at Franklin, Tampa, Florida 33601; P. A. Hubbart, Public Defender, Justice Building, 1351 N.W. 12th Street, Miami, Florida; Bruce S. Rogow, Esquire, 622 N.W. 62nd Street, Miami, Florida 33150; and to The Honorable Robert L. Shevin, Attorney General of Florida, The Capitol, Tallahassee, Florida 32304. All parties required to be served have been served.

VANN H. LEFCOE
Assistant Attorney General

FOOTNOTES

[1] Code of Virginia, §§ 19.1-347.1 - 19.1-347.5.
[2] La. Rev. Stat. Titl. 15, Art. 303.
[3] N.J.S.A. 2A :85-7.
[4] N.C. Gen. Stats. § 14-3.
[5] Alaska Stats. § 11.05.010.
[6] Ark. Stat. Ann. 41-106.
[7] Col. Rev. Stat. Ann. § 39-10-19 (1969 Supp.).
[8] Ga. Code Ann. § 27-2506.
[9] Ill. Ann. Stat. Ch. 38 § 1-7 (Supp. 1971).
[10] Iowa Code Ann. § 687.7.
[11] Kan. Gen. Stat. Ann. § 21-4502 (1970 Supp.).
[12] Ky. Rev. Stat. Ann. 431.075.
[13] Me. Rev. Stat. Ann. Title 15 § 1741.
[14] Mo. Rev. Stat. § 560.605.
[15] N.Y. Penal Law § 70.15.
(Although New York distinguishes between Class A, Class B, and unclassified misdemeanors, since counsel is appointed in all cases New York's maximum Class A penalty is included for purposes of this illustration.)
[16] N.D. Code 12-06-14.
[17] Okla. Stat. Ann. Tit. 21 Sec. 10.
[18] Ore. Rev. Stat. § 161.080.
[19] R.I. Gen. Laws Ann. § 11-1-2.
[20] S.D. Comp. Laws Ann. Sec. 22-6-2.
[21] Tenn. Code Ann. § 39-105 (Supp. 1970).
[22] Code of Virginia, § 18.1-109.
[23] Wash. Rev. Code Ann. § 9.92.020.
(Although Washington distinguishes between gross misdemeanors and simple misdemeanors, which carry a maximum of 90 days, § 9.92.030, counsel is apparently provided for neither.)
[24] Wis. Stat. Ann. § 939.61.
[25] Ala. Code Title 15, § 327 (1958).
[26] Ariz. Rev. Stat. Ann. § 13-1645.
[27] Cal. Penal Code § 19.
[28] Idaho Code Ann. § 18-113 (1969 Supp.).
[29] Miss. Code Ann. § 2562 (1967 Supp.).
[30] Mont. Rev. Code Ann. § 94-116.
[31] Nev. Rev. Stat. 193.150.
[32] N.M. Stat. Ann. § 40A-29-7 (Supp. 1969).
(Although New Mexico has a maximum of one year for non-petty misdemeanors, that State also provides counsel in such cases.)
[33] Utah Code Ann. § 76-1-16 (Supp. 1969).
[34] Fla. Stat. Ann. § 775.07.
[35] Mich. Comp. L. § 750.504.

[36] Minn. Stat. Ann. § 609.03.
[37] Wyo. Stats. § 6-7.
[38] Del. Code Ann. Tit. 11, § 105.
[39] N.H. Rev. Stat. Ann. Sec. 607:14 (1970 Supp.).
[40] S.C. Code Ann. § 17-553.
[41] *Ex parte Garrison,* 36 W.Va. 686, 15 S.E. 417 (1892).
[42] Conn. Gen. Stat. Ann. § 54-195.
[43] Hawaii Rev. Stats. § 712-2.

FILE COPY

IN THE

Supreme Court of the United States

No. 70-5015

JON RICHARD ARGERSINGER,

Petitioner,

v.

RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF FLORIDA

MOTION OF STATE OF ALASKA FOR LEAVE TO FILE BRIEF AND BRIEF AS AMICUS CURIAE

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SUPREME COURT OF FLORIDA

MOTION OF STATE OF ALASKA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The State of Alaska by its Attorney General, John E. Havelock, respectfully moves this Court for leave to file the accompanying brief as *amicus curiae.*

The applicant has an interest in this case in that the decision will affect the administration of justice in the courts of the State of Alaska.

This brief is necessary to expand on the methods by which representation of misdemeanor defendants can be provided without encumbering our judicial system. The brief of the petitioner is inadequate on this topic.

Respectfully submitted

STATE OF ALASKA

By John E. Havelock
Attorney General
State of Alaska

IN THE

Supreme Court of the United States

No. 70-5015

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BRIEF OF STATE OF ALASKA AS AMICUS CURIAE

In this brief the State of Alaska, as *amicus curiae* urges this Court to adopt a rule requiring representation in all misdemeanor cases where a conviction might possibly result in incarceration for however short a period after conviction. The type of representation urged is not restricted to representation by a member of the bar but would depend upon each state's selection of effective alternative methods of representation, all of which have as their purpose securing

fairness to the defendant. The Court is here asked only to declare that such a right exists in specific classifications of cases. The selection of alternative methods or the implementation of novel methods should be left to the states with this Court invalidating only those methods which on review are found to result in denial of the constitutional right to a fair, reasonably effective form of representation.

I

The course urged here is based in part upon dissenting and concurring opinions of Mister Justice Harlan in *Smith v. California*,[1] *Mapp v. Ohio*,[2] *Gideon v. Wainwright*,[3] *Miranda v. Arizona*,[4] and *In Re Gault*.[5] While the Bill of Rights provision in those cases differ, Harlan's opinion in each was that the function of the Court should be limited to declaring what those rights are.

It should not have directed the states in the specific manner by which they must guarantee those rights, but should have left to the states the choice of the particular method by which they would provide the announced constitutional guarantees to their citizens.

Differences in (1) misdemeanor case loads, (2) means of funding representation of indigents, (3) jurisdiction of state courts over misdemeanors, (4) ability of prosecutors of misdemeanor cases, and the probability that a requirement of representation by a member of the bar in all misdemeanor cases involving the possibility of any period of incarceration would subjugate the court systems of larger cities to a state of anarchy are reasons why fairness to defendants and efficiency of judicial administration would best be served by

[1] 361 U.S. 147 (1959)

[2] 367 U.S. 643 (1961)

[3] 372 U.S. 335 (1963)

[4] 384 U.S. 436 (1966)

[5] 387 U.S. 1 (1967)

this Court's enunciating the right, leaving the choice in its implementation to the states.

In *Smith v. California*,[6] the court held that a seller of an obscene book cannot be criminally liable absent a showing that he knew the contents to be obscene. Justice Harlan dissenting in part said[7] the trial court should not have found the book obscene without examining it in light of contemporary standards of the community. He would not restrict the type of evidence by which community standards of obscenity could be proved but would leave this decision to the states whose evidence laws differ.

In *Mapp v. Ohio*[8] Harlan, J., dissenting, was of the opinion that the majority should not have imposed both the federal search and seizure rule and the federal remedy of exclusion upon the states.

> The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State.... In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement.[9]

And in *Gideon v. Wainwright*[10] Harlan, Jr., concurred:

> When we hold a right or immunity, valid against the Federal Government, to be "implicit in the concept of ordered liberty" and thus valid against the States, I do not read our past decisions to suggest that by so holding, we automatically carry over an

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[6]361 U.S. 147

[7]361 U.S. at 172

[8]367 U.S. 643 (1961)

[9]367 U.S. at 680-81

[10]372 U.S. 335 (1963)

> entire body of federal law and apply it in full sweep to the States. Any such concept would disregard the frequently wide disparity between the legitimate interests of the States and of the Federal Government, the divergent problems that they face, and the significantly different consequences of their actions. In what is done today I do not understand the Court to depart from the principles laid down in *Palko v. Connecticut*, 302 U.S. 319, or to embrace the concept that the Fourteenth Amendment "incorporates" the Sixth Amendment as such.[11]

In *Miranda v. Arizona*[12] Harlan thought the court should not have gone so far as the rules announced by the majority when he dissented:

> It is no secret that concern has been expressed less long-range and lasting reforms be frustrated by this Court's too rapid departure from existing constitutional standards. Despite the Court's disclaimer, the practical effect of the decision made today must inevitably be to handicap seriously sound efforts at reform, not least by removing options necessary to a just compromise of competing interests. Of course legislative reform is rarely speedy or unanimous, though this Court has been more patient in the past. But the legislative reforms when they come would have the vast advantage of empirical data and comprehensive study, they would allow experimentation and use of solutions not open to the courts, and they would restore the initiative in criminal law reform to those forums where it truly belongs.[13]

In *In Re Gault*[14] Harlan thought the Court should not have held the procedure of the Arizona court unconstitutional without first setting standards by which due process

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[11] 372 U.S. at 352

[12] 384 U.S. 436 (1966)

[13] 384 U.S. at 524

[14] 387 U.S. 1 (1967)

in juvenile courts is to be measured. Had it set such standards each state would have been allowed to choose the specific means by which its juvenile courts would comply with those standards.

> The Court should instead measure the requirements of due process by reference both to the problems which confront the State and to the actual character of the procedural system which the State has created. The Court has for such purposes chiefly examined three connected sources: first, the "settled usages and modes of proceeding," (citation); second, the "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions," (cite); and third, the character and requirements of the circumstances presented in each situation. . . .[15]

II

THERE ARE MEANS OF PROVIDING FAIR AND EFFECTIVE REPRESENTATION IN MISDEMEANOR CASES WITHOUT REQUIRING THE SERVICE OF A MEMBER OF THE BAR.

By leaving to the states the choice of method of representation each state will be encouraged to select the method best suited to its judicial system and best designed to provide representation where it is needed most in that state.

While some may assert that allowing this choice risks the possibility that the right will be denied, it is urged that this risk is outweighed by the benefits to be derived from the thorough consideration which will precede the choice of method and by this Court's power to review and invalidate ineffective means of representation.

Possible methods of representation are:

1. States could require the judge hearing a misdemeanor case to prohibit a prosecution by an attorney where

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[15] 387 U.S. at 68

the ability of the defense representation is incommensurate with that of the prosecution. If the prosecutor in a municipal court is just a police officer, then representation of the defendant by a law student or para-legal is fair.

2. Misdemeanor defendants could be tried without representation if the prosecutor urges and the court concurs that a penalty of fine only, not incarceration will be imposed upon a finding of guilt even though the statute allows a more severe penalty.

3. Misdemeanor defendants could be tried without representation where the state provides a modified inquisitorial system, similar to that used in juvenile courts, to replace the adversary system in misdemeanor cases.

4. States could examine and license para-legals to represent defendants in misdemeanor cases at the expense of the prosecuting municipality. Courses in constitutional law, criminal law and procedure and evidence comprise at most only one fifth of current law school curriculums. The substance of these courses presented in condensed form rather than by case method could be learned by the average college students in one semester. Such a program would likely be popular with students of law, pre-law, criminology and political science. It would encourage knowledge of law by layman to the benefit of all society. It would encourage complacent members of the legal profession to put forth their best efforts lest they be embarrased by an amateur. It would encourage the police to treat all accused misdemeanants with respect now accorded to only those who can afford to hire an attorney. It would improve the skill and provide experience for aspiring lawyers by affording them the opportunity to test and sharpen their legal abilities during pre-law and law school with resulting benefit to the profession and to a lawyer's first clients, civil and criminal, who frequently suffer the cost of errors in early trial experience.

These ancillary benefits alone would far outweigh the possibility that a representation requirement in misdemeanor cases might overburden the administration of criminal justice. To allow states and municipalities to first decide how much they can afford to spend on the courts, then select classes of defendants who will be protected, is a form of invidious discrimination far more class oriented than that outlawed in *Shapiro v. Thompson*[16]. Courts should strive to administer justice efficiently, not to administer less of it.

5. In states whose courts have already decided that an accused in a misdemeanor case is entitled to representation by a member of the bar, and should this Court hold the same, fairness and expediency would still be promoted by authorizing state courts to find a waiver of this right where states provide alternative methods of representation to encourage such a waiver.

III

THERE IS NO RATIONAL BASIS FOR A DENIAL OF REPRESENTATION TO INDIGENTS IN MISDEMEANOR CASES WHILE REQUIRING IT IN FELONY CASES.

The distinction between capital and non-capital felony cases was held by this Court in *Gideon v. Wainwright*[17] insufficient to ground denial of counsel to indigents in non-capital felony cases while granting counsel to indigents in capital cases. The reasoning in Gideon's brief applies with equal force to a similar difference in treatment of indigents based on the felony-misdemeanor distinction, to wit: the decisions that the defendant must make are as numerous and can be as complex, and the disparity between the prosecutor's ability and the defendant's is likely to be just as great.

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[16] 394 U.S. 618 (1969)

[17] 372 U.S. 335 (1963)

If representation by someone with knowledge of the criminal trial process is essential to a fair trial, as held in *Gideon*, then the distinction in the right to representation is based on the implied conclusion that since the sentence is less, it is all right to treat the defendant unfairly. In *Gault* this Court said:

> Under our Constitution, the condition of being a boy does not justify a Kangaroo court.[18]

Nor should the fact that the crime charged is a misdemeanor. Fairness is inherently lacking without representation.

The Alaska Supreme Court in *Baker v. City of Fairbanks*[19] extended the right to trial by jury to all criminal prosecutions which it defined

> as including any offense a direct penalty for which may be incarceration in a jail or penal institution. It also includes offenses which may result in the loss of a valuable license, such as drivers license or a license to pursue a common calling, occupation, or business. It must also include offenses which, even if incarceration is not a possible punishment, still connote criminal conduct in the traditional sense of the term.[20]

The court stressed the importance of the consequences to the accused as a determinative factor:

> In interpreting the Alaska Constitution we must consider the consequences of denying jury trial to the person being prosecuted . . . . [T]he great bulk of the citizenry encounters the judicial process most frequently in the prosecution of what have been called the petty offenses. Punishments inflicted at that level can be as harsh and as devastating to the life of a citizen as those meted out for more serious misdemeanors and for felonious conduct. Why

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[18] 387 U.S. at 28

[19] 471 P.2d 386 (Alaska 1970)

[20] 471 P.2d at 402

> should the remedial process be less just at one level than at another.[21]

The research[22] and cases which conclude that representation is an absolute requirement of a fair trial in criminal cases are unimpressive literary exercises if they were meant to deny that such a right is just as essential in misdemeanor cases.

IV

UNLESS AN INDIGENT CHARGED WITH A MISDEMEANOR IS PROVIDED WITH REPRESENTATION, THE PROSECUTION HAS THE OPPORTUNITY TO ABUSE HIS CONTROL OVER THE PROCEEDINGS.

If an indigent in a misdemeanor case is not given representation, the prosecutor can charge the accused with a misdemeanor that was committed in the furtherance of a felony, and thereby control pre-trial proceedings, including questioning of the defendant, without the hindrance of a defense attorney. Facts gathered in the course of the misdemeanor prosecution could later be used in a felony prosecution arising out of the same facts. This result would frustrate the rule announced in *Massiah v. United States,*[23] that counsel is required at all proceedings before trial when consultation, investigation and preparation are vitally important.

It is difficult to limit the risk of prosecution in a misdemeanor case to the maximum six months incarceration since convictions for multiple misdemeanors arising out of the same set of circumstances can result in several six-month sentences to run consecutively. Unless indigents in misdemeanor cases are provided representation, prosecutors will

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[21] 471 P.2d at 401

[22] Report by the President's Commission on Law Enforcement and Administration of Justice, "The Challenge of Crime in a Free Society." (1967), pp. 86-87.

[23] 377 U.S. 201 (1964)

be encouraged to divide a felonious act into elements that will support misdemeanor charges, thus accomplishing indirectly what cannot be done directly without aid of counsel.

CONCLUSION

For the foregoing reasons, *amicus* State of Alaska respectfully requests this Court to hold that persons charged with a crime for which any period of incarceration is a possible sentence are entitled to be advised of their rights to that form of representation provided by the prosecuting government which *prima facie* will provide effective, fair protection of the rights of the accused.

Respectfully submitted,

STATE OF ALASKA

By John E. Havelock
Attorney General
State of Alaska

Amicus Curiae

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RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Attorney General of the State of Utah respectfully moves the Court for permission to file this brief as Amicus Curiae.

LAUREN BEASLEY
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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 5798

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RAYMOND HAMLIN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Attorney General of the State of Utah respectfully moves the Court for permission to file this brief as Amicus Curiae.

INTEREST OF AMICUS

Utah Code Ann. § 77-64-2 (Supp. 1969) provides "that assigned counsel shall represent every indigent person who is under arrest for a crime in which the penalty to be im-

posed could be confinement for more than six months in either jail or prison." The Legislature of the State of Utah, while recognizing that an accused has the right to counsel, has stated that the State is under no duty to provide counsel for an indigent charged with a misdemeanor. Recently, in *Hortencio* v. *Fillis*, 25 Utah 2d 73, 475 P. 2d 1011 (1970) the Supreme Court concluded that it should be left to the legislature if it so desires to expand the system of assigned counsel and to provide for the expenditure of public funds.

The State of Utah agrees with and fully endorses the position taken by the Attorney General of the State of Florida in their stand against the requirement of counsel where an indigent defendant, upon conviction, faces a maximum penalty which does not exceed six months imprisonment and a one thousand dollar fine. Furthermore, there are compelling interest of the State of Utah involved in the ultimate outcome of this case. An adverse ruling in this case would cause an unbearable burden upon the State of Utah in the form of financial shortages, lack of available personnel and inefficient court administration.

QUESTION PRESENTED

Should the right of counsel be extended to require publicly funded counsel for an indigent defendant who upon conviction of a crime faces a maximum penalty which does not exceed six months imprisonment and a one thousand dollar fine.

SUMMARY OF ARGUMENT

The State of Florida does not provide counsel for indigents charged with an offense which entails a possible incarceration of more than six months in jail. This practice is in accord with the Constitution of the United States as interpreted by this Court. In *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) the Court held that counsel must be appointed for indigents charged with a felony. Later, *In Re Gault*, 387 U. S. 1, 29 (1967) and *Mempa* v. *Rhay*, 389 U. S. 12, 34 (1967) the Court held that there was an absolute right to appointment of counsel in felony cases. This Court should adhere to the felony-misdemeanor standard to render respect for State legislative judgments concerning the seriousness and consequences attached to various crimes. The "Due Process Clause" of the Fourteenth Amendment should not be used as a tool to enforce a federally dictated code of criminal procedure upon the states.

In the alternative, the "six month" limitation for the appointment of counsel for indigents as practiced by the State of Florida should be adhered to. The right to "trial by jury" is analogous to the right to the asistance of counsel. In *Baldwin* v. *New York*, 399 U. S. 66 (1970) this Court drew the line between petty offenses and serious crimes holding that a "possible six month penalty is short enough to permit classification of the offense 'as petty'." *Id.* at 69. This "six month standard" is also followed in Criminal Justice Act of 1964 and the Federal Rules of Procedure for the Trial of Minor Offenses before United States Magistrates, which rules were promulgated by this Court.

To decide, as petitioner contends, that the appointment of counsel should be extended to any time a deprivation of liberty is possible, would cause an unbearable burden upon the majority of the states. The monetary costs of appointed counsel in addition to the manpower requirements are staggering. Consideration must also be given to the taxed court systems. Counsel for "misdemeanants" would also become a vast spawning ground for writs of habeas corpus. This Court must consider the indirect expense of allocating such a massive amount of its legal and judicial resources to this singular area of concern.

Finally, the Equal Protection Clause does not require appointment of counsel for indigent defendants facing a maximum punishment of less than six months. In the vast majority of "misdemeanors" which entail a possible jail sentence, people who can afford counsel usually do not do so. The more advantages society extends to the indigent, the more apparent is the comparative disadvantage of being of modest means. Equal protection of the law cannot be advanced by promising more than it can deliver. No matter how much the State elects to furnish, persons with money can buy more.

ARGUMENT

I.

THE PRACTICE OF THE STATE OF FLORIDA WHICH PROVIDES COUNSEL FOR INDIGENTS FACED WITH A POSSIBLE INCARCERATION OF MORE THAN SIX MONTHS

IS IN HARMONY WITH THE SIXTH AMENDMENT AND DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. Neither the Constitution Nor the Decisions of this Court Require Counsel for an Indigent Defendant Charged With a Misdemeanor.

The Sixth Amendment to the Constitution of the United States provides in part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to have the Assistance of Counsel for his defense." "This provision in the Sixth Amendment to the Constitution emerged in an atmosphere of silence concerning the intentions which produced it." Beaney, *Right to Counsel* 25, (1955). There was a general understanding that the federal courts would have jurisdiction of an insignificant number of criminal proceedings and, therefore, "The logical assumption is that no great thought was given to the precise nature of the federal right to counsel." *Id.* at 25.

It is clear, however, that lawyers at common law were not permitted full participation in criminal cases. Not until 1836 did England afford full recognition to the defense lawyer's role in felony prosecutions. Allen, *The Supreme Court, Federalism, and State Systems of Criminal Justice*, 8 *DePaul L. Review* 213, 224 (1959). The right to counsel which the Sixth Amendment provides, meant to insure that when a defendant had secured a lawyer to represent him, the

latter would be permitted to participate in the proceedings and speak in the defendant's behalf.

Beginning with *Powell* v. *Alabama*, 287 U. S. 45 (1932) this Court held that the assistance of a lawyer was necessary for a fair trial in cases involving possible capital punishment. Ten years later in *Betts* v. *Brady*, 316 U. S. 455 (1942) the Court held that the Sixth Amendment right of counsel was applicable *only* to the Federal Government. However, the "Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right . . . we cannot say that the Amendment embodies an inexorable command that no trial for any offense or in any court, can fairly be conducted and justice accorded a defendant who is not represented by counsel." *Id.* at 473.

Of course, in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) this court held that the Sixth Amendment was applicable to the states through the Fourteenth Amendment, thus overruling the "special circumstances" rule of *Betts*. In *Gideon* the petitioner was charged in a Florida state court with a felony. Justice Black in writing the opinion of the court stated:

> "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." *Id.* at 344.

Justice Harlan, concurring in *Gideon*, noted:

> "The special circumstances rules has been formally abandoned in capital cases, and the time has now come when it should be similarly abandoned in noncapital cases, at least as to offenses which, as the one involved here, carry the possibility of *substantial prison sentence.* (Whether the rule should extend to *all* criminal cases need not now be decided.) *Id.* at 351. (Emphasis added.)

Justice Marshall in speaking for a unanimous court in *Mempa* v. *Rhay*, 389 U. S. 12 (1967) said:

> "In *Gideon* v. *Wainwright* . . . however, Betts was overruled and this court held that the Sixth Amendment as applied through the Due Process Clause of the Fourteenth Amendment was applicable to the States, and accordingly, that there was an *absolute right to appointment of counsel in felony cases. Id.* at 34. (Emphasis added.)

Also this Court in *In Re Gault*, 387 U. S. 1 (1967) stated that Gault would be entitled to have the state provide counsel "at least if a felony were involved." *Id.* at 29; and if his parents were unable to afford counsel. It is clear that on the basis of past precedents this court has declared that the right to counsel in state courts extends only to felonies. This reasoning is soundly based. The Fourteenth Amendment provides that ". . . Nor shall any state deprive any person of life, liberty, or property without due process of law . . ." In *Gideon*, Justice Black, speaking for the Court, stated, "We accept *Betts* v. *Brady's* assumption, based as it was on our prior cases, that a provision of the

Bill of Rights which is fundamental and essential to a fair trial is made obligatory upon the States by the Fourteenth Amendment." *Id.* at 342. Certainly, the duty of the State to provide counsel for indigents charged with a misdemeanor cannot in any sense of the word be termed a "fundamental" right.

As stated in *Brison* v. *State of Florida,* 273 F. Supp. 840 (1967) the right to counsel guaranteed by the Sixth and Fourteenth Amendments is not an absolute right, nor are any of the rights guaranteed by the Constitution. Thus, the right to free exercise of the religion of one's choice is on its face absolute, but in application is limited since a religion requiring illegal activities would not be constitutionally protected. *Reynolds* v. *United States,* 98 U. S. 145 (1878). The absolute right to free speech has been qualified and curtailed by libel and slander laws. Such right on occasion must be subordinated to other values and consideration. *Dennis* v. *United States,* 341 U. S. 494 (1950). Likewise, the "absolute right" to counsel in all criminal prosecutions must be qualified by practical exigencies and unless this is done:

> "(t)he necessities of sound judicial administration would be disregarded and the administration of justice thrown into senseless chaos." *Brinson* v. *State of Florida,* 273 F. Supp. 840, 847 (1967).

Indeed, the petitioner does not contend that the Fourteenth Amendment must be applied absolutely, but argues that persons charged with offenses which may result in a loss of "liberty" are to have counsel appointed if they are

indigent. (Petitioner's brief for Certiorari at 41-2). Yet, the Fourteenth Amendment also declares that a State shall not deprive any person of "property" without due process of law. Therefore, in accord with the petitioner's "absolute" construction, the states should afford counsel for indigents charged with a $2 parking violation. Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685, 712 (1968).

The traditional state classification of crimes as felonies or misdemeanors should be continued, as the line where appointment of counsel is required. There are extreme circumstances where the felony-misdemeanor distinction might undermine *Gideon*. However, cases such as *Patterson* v. *State*, 227 Md. 194, 175 A. 2d 746 (1961) are the rare exception. In *Patterson*, the defendant was convicted of misdemeanors having a maximum penalty of 2 years or $1000 fine. The lower court refused to appoint counsel because the charges were not "serious" within the statutory definition. The State Supreme Court affirmed. On certiorari, *Patterson* v. *Warden Maryland Penitentiary*, 372 U. S. 776 (1963), the judgment was vacated and the case remanded for further consideration in the light of *Gideon*. It is obvious that a 2 year jail sentence based upon several misdemeanors would violate *Gideon;* however, the vast majority of crimes classified as misdemeanors would not entail such a severe penalty.

One of the basic reasons this Court should adhere to the felony-misdemeanor standard set forth in *Gideon* is respect

for State legislative considerations of the relative seriousness of various crimes. As every school boy knows, the framers of the Constitution established a federal government with limited powers. As the Tenth Amendment declares, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Indeed, the Bill of Rights was intended to be a limitation upon the federal government and not upon the states. To what extent the Fourteenth Amendment through the "due process clause" incorporates the Bill of Rights guarantees is a subject of considerable controversy. However, apart from the theory, the immediate thrust of the "due process clause" has had profound consequences on state criminal procedure. As stated in *City of Toledo* v. *Frazier*, 10 Ohio App. 2d 51, 226 N. E. 2d 777 (1967).

> "Today a pervasive system instituted by the Supreme Court of the United States covers almost every aspect of state criminal law enforcement from arrest through trial and sentence to appeal. All these limitations have been developed by the United States Supreme Court, case by case, from the vague words of the Fourteenth Amendment's due process of law and equal protection of the laws." *Id.* at 782.

The Supreme Court of the State of Utah in *Dyett* v. *Turner*, 20 Utah 2d 403, 439 P. 2d 266 (1968) has raised a "hue and cry" over this Court's interpretation of the "due process" clause as applicable to criminal procedure:

> "As a result of the recent holdings of that Court, the sovereignty of the States is practically abolished

> and the erstwhile free and independent states are now in effect and purpose merely closely supervised units of the federal government . . ." *Id.* at 267.

The implications of petitioner's argument to provide counsel for whenever a loss of liberty is threatened is in direct contradiction of the concept of federalism as envisioned by the framers of the Constitution. Petitioner contends that crimes should be reclassified so that the actual threat of punishment should actually reflect community standards about the seriousness of the offenses. (Petitioner's brief at 39.) Traditionally, the process of defining crimes and selecting appropriate sentences has been vested with the legislative branch of government. *Morgan* v. *Devine*, 237 U. S. 632, 639 (1915). Therefore, it is solely the prerogative of State legislatures to define crimes and establish attendant penalties for violation.

The State's classification of felony or misdemeanor reflects the decision of State legislatures as to the relevant consequences or seriousness of a particular crime. There is no constitutional requirement that the criminal laws of the various states must be in unison or harmony, nor is the due process clause the appropriate device to impose a national standard of criminal law or procedure. See *Hearings on H. Res.* 17, 91st Cong. 1st Sess. 629-33 (1969), Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 *Calif. L. Rev.*, 929 (1965).

Misdemeanors are usually associated with trivial offenses described as *malum prohibitum* rather than *malum*

in se as are most felonies. Misdemeanors have none of the sanctions in addition to fine or imprisonment associated with felonies. "A conviction of a felony is punished not only by imprisonment but also by the forfeiture of civil rights such as the right to vote, to serve on a jury, and to hold public office. And not infrequently, such a conviction will prove to be an insurmountable barrier to desirable employment." *Wall* v. *Purdy*, 321 F. Supp. 367, 371 (1971).

It may well be that "*Mapp* sounded no death knell for our federalism . . . that a healty federalism depends upon the avoidance of needless conflict between state and federal courts . . . by recognition of their now mutual obligation to respect the *same fundamental criteria* in their approaches." *Ker* v. *California*, 374 U. S. 23, 31 (1963). If petitioner's contentions were to prevail, what was once termed a mutual obligation to respect, will become another militant commandment to obey federally dictated criminal law and procedure.

As stated by the Supreme Court of the State of Washington in *Hendrix* v. *City of Seattle*, 76 Wash. 142, 456 P. 2d 696 (1969).

> "*The traditional line drawn between felonies and lesser crimes has persisted from our colonial beginnings* to the present time and no authoritative decisions to the contrary have been presented to us which eradicate that distinction." *Id.* at 700. (Emphasis added.)

The right to have counsel is not the exact constitutional equivalent of the right to free counsel. The rule should re-

main that counsel for indigents should be supplied at the public expense only for felonies as defined by state law.

One of this Court's greatest members declared, "Delusive exactness is a source of fallacy throughout the law." Holmes' dissent in *Truax* v. *Corrigan*, 257 U. S. 312, 342 (1921). The Sixth Amendment only provides that an accused shall have the *right* to the "Assistance of Counsel." To hold that this provision was "absolute," applicable to every violation of a crime which could result in a loss of liberty, would undermine State legislated criminal law and procedure.

B. The Right to Trial by Jury, the Criminal Justice Act of 1964, and the Rules of Procedure for Trial of Minor Offenses before United States Magistrates, all Use Six Months as a Basis to Distinguish Petty Offenses From Serious Crimes.

1. *Right to Trial by Jury*

The phrase "all criminal prosecutions" applies not only to the right of counsel but also to the right to a jury trial. In *Duncan* v. *Louisiana*, 391 U. S. 145, 149 (1968), this Court held that trial by jury in criminal cases is ". . . (f)undamental to the American scheme of justice" and that the "Fourteenth Amendment guarantees a right of jury trial in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment's guarantee." This Court concluded that a jury trial is guaranteed in all "serious offenses" but does not extend to "petty crimes." The Court did hold on the facts before it where

a crime punished by two years in prison is a serious crime and not a petty offense.

However, in *Baldwin* v. *New York*, 399 U. S. 66 (1970), the Court "drew the line" between petty offenses and serious crimes so that a "possible six-month penalty is short enough to permit classification of the offense as 'petty.'" *Id.* at 69. The significance of *Baldwin* is that the Court looked to various guides to determine whether the length of the authorized prison term or the seriousness of other punishment is enough to require a jury trial. The first guide was "the existing laws and practices in the Nation." *Id.* at 70. This Court noted that in the federal system petty offenses have been defined as those punishable by no more than six months in prison and a $500 fine. 18 U. S. C. Sec. 1 (1964). The Court also looked to State law and determined that in every jurisdiction but New York crimes triable without a jury were also generally punishable by no more than a six month jail term.

Both the right to trial by jury and the right to counsel of the Sixth Amendment are phrased in absolute language. Logically, the phrase "all criminal prosecutions" should be accorded the same meaning as applied to both protections. *Beck* v. *Winters*, 407 F. 2d 125, 128 (8th Cir. 1969). The statement in *State* v. *Borst*, 154 N. W. 2d 888 (Minn. 1967) that, "It is conceivable that a fair trial may be had before an impartial judge without a jury, but it is hardly conceivable that a person ignorant in the field of law car adequately defend himself without the assistance of counsel."

Id. at 894; is a gross exaggeration. From the beginning of our colonial history the people of this country have seen a need within the framework of their government for courts of limited jurisdiction designed to handle the lesser offenses speedily. "At the time of adoption of our federal constitution there existed in the country justice of the peace courts . . ." *Hendrix* v. *City of Seattle*, 76 Wash. 142, 456 P. 2d 696, 703 (1969).

In many parts of the country, including Utah, justices of the peace are not even lawyers. What is "inconceivable" is the fact that a defendant would not be able to adequately defend himself in the relatively non-complex proceeding in a justice court. Aside from proceeding in justice of the peace courts, the legal issues involved in the usual misdemeanor are less complex than those involved in a serious offense or felony. The skills necessary to defend a speeding violation are less involved than those required to defend a charge of first-degree murder.

In *Duncan*, supra, Justice White stated that "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. *Id.* at 156. Similarly, the right to counsel protects against arbitrary action and conduct of judge and prosecutor. Moreover, as stated in Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685, 707 (1958), what the right to counsel and the right to trial by jury have in common that largely dis-

tinguishes them from other Sixth Amendment rights, is that both require large out-of-pocket expenditures of public funds.

The second guide in *Baldwin* concerned the fact that every State (with the exception of New York) provided a jury trial for a crime punishable by imprisonment for longer than six months. The reverse is true in the case of the right to counsel, for only a handful of states provide counsel for any crime which would result in imprisonment. Therefore, crimes punishable by a penalty of six months or less should not require the appointment of counsel.

2. *Criminal Justice Act of* 1964

Title 18 U. S. C. Sec. 1 (1964) (1) provides that any offense punishable by death or imprisonment for a term exceeding a year is a felony, (2) any other offense is a misdemeanor, (3) any misdemeanor, the penalty of which does not exceed imprisonment for a period of six months or a fine of not more than $500 or both, is a petty offense. Title 18 U. S. C. Sec. 3006 (b) provides for the appointment of counsel, "In every criminal case in which the defendant is charged with a felony or a misdemeanor (other than a petty offense defined in section 1 of this title) . . ."

These crimes were defined solely in terms of the severity of the penalty and as is clearly seen, the federal standard provides for the appointment of counsel in federal prosecutions of indigent defendants in all cases other than those in which "petty offenses" are involved. The congres-

sional enactment was preceded by study and research and reflects the legislative recognition of the necessity of representation of indigent defendants within the limits of practicality.

3. *Rules of Procedure for the Trial of Minor Offenses before United States Magistrates*

These rules as promulgated by this Court govern the procedure and practice for the trial of minor offenses (including petty offenses) before United States Magistrates under Title 18 U. S. C. Sec. 3401, and for appeals in such cases to judges of district courts. Rule 2 provides that the magistrate shall inform a defendant charged with a minor offense *other than a petty offense* "of his right to retain counsel" and of "his right to request the assignment of counsel." But for petty offenses under Rule 3, the Magistrate shall state to the defendant the charge against him *and shall inform the defendant of his right to counsel* and to a trial in the district court. Thus, as Justice Black states in dissent, the rules appear to safeguard the rights of trial by jury and assignment of counsel for minor offenses *but not for petty offenses.*" Of course, 18 U. S. C. Sec. 1 (1964) defines a petty offense as any misdemeanor, the penalty of which does exceed imprisonment for a period of six months or a fine of $500. This Court, as well as Congress, has held that an offense with a maximum penalty of six months is a "petty offense which counsel need not be appointed." Although this Court should affirm the felony-misdemeanor distinction except in unusual cases where the penalties for

the misdemeanors are compounded together, in the alternative, the six month standard should be utilized for the necessity of appointment of counsel.

II.

TO EXTEND *GIDEON* TO CRIMES WITH A MAXIMUM SENTENCE OF SIX MONTHS OR LESS WOULD CAST AN OVERWHELMING BURDEN UPON THE STATES.

An extension of appointed counsel to an indigent defendant who upon conviction faces a maximum penalty which does not exceed six month imprisonment would cause an unbearable burden upon the States as well as the Federal Government. In the President's Commission on Law Enforcement and Administration of Justice, Task Report: The Courts, 55 (1967) states that approximately 60 percent of all felony defendants and between one quarter and one half of all misdemeanor defendants are unable to contribute anything to the cost of their defense, and "it is reasonable to assume that at least 50 percent of the defendants in appeals and postconviction proceedings need appointed counsel." *Id.* at 56. Data collected in 1966 by the American Bar Foundation indicates that governmental contributions for defense of the poor in State Courts, *primarily for felony cases alone* are approximately $17 million a year, with private contributions from local communities or charitable foundations providing an additional $1 million. In the Federal System, Congress has appropriated $3 million per year to provide compensation for counsel representing about

15,000 to 20,000 defendants including some charged with misdemeanors at trial or on appeal.

In L. Silverstein, *Defenses of the Poor in the Criminal Cases in American State Courts*, 123 (1965) estimates that there are 5 million *non*-traffic misdemeanor cases brought annually in the United States. The President's Commission, Task Force Report: The Courts, similarly state: "It seems reasonable to assume, therefore, that there are between 4 and 5 million adult misdemeanor court cases each year, exclusive of traffic offenses." *Id.* at 55. In Note, *Dollars and Sense of an Expanded Right to Counsel*, 55 *Ia. L. Rev.* 1249, 1260 (1970) estimates, although no authoritative statistics are available, that there are another 50 *million* traffic offenders per year. If "it is necessary to provide representation for 1 million to 1.25 million indigent misdemeanants annually, compensating assigned counsel . . . would necessitate a total expenditure of between $50 million and $62.5 million annually." *Id.* at 1263. "If a public defender system were utilized, the defense of these same misdemeanants would cost $31.5 million to $46 million. To provide appointed counsel to the 12.5 million indigent traffic offenders at $25 per case would require an annual outlay of $312.5 million. To compensate the 10,417 public defenders necessary for the presentation of indigent traffic offenders . . . would cost 208,340,000 dollars." *Id.* at 1263-1264. While the article considers office expenditures as part of the total, additional expenses should also be considered such as increased court expenditures brought about by additional; facilities, judges, prosecutors, court reporters, secretaries, etc.

Purely from a monetary standing, petitioner's proposal to provide counsel for persons charged with offenses which may result in a loss of liberty staggers the imagination.

In the same article Note, *Dollars and Sense of an Expended Right to Counsel*, 55 *Ia. L. Rev.* 1249, 1265 (1970) to represent the non-traffic misdemeanor, 1,014 full time public defenders would be needed, and the 12.5 million indigent traffic offenders would require 10,417 public offenders. L. Silverstein, *Manpower Requirements in the Administration of Criminal Justice* in Task Force Report, The Courts (1967) states:

> ". . . there remains a large number of relatively poor States and individual counties that cannot be expected to provide adequate compensation for counsel, or defender systems, no matter how hard they try. These States and counties have such limited financial resources and so many other demands for public expenditures that it is practically impossible for them to provide adequate financial support for defense of indigents either now or in the foreseeable future." *Id.* at 159.

Not only would allowing counsel for misdemeanors cause a severe manpower and financial strain upon the States, but the orderly administration of the Courts would suffer. The Task Force Report: The Courts (1967) states:

> ". . . Undue delay is as inconsistent with the goals of the system as a hasty process in which decisions are made without opportunity for deliberation . . . The courts' inability to handle their volume of cases has many deleterious effects. Most criminal

> cases are disposed of by dismissal or by plea of guilty . . . Defendants often manipulate the system to obtain sentencing concessions in return for guilty pleas . . ." *Id.* at 80.

The report further summarizes that delay may undermine the public's confidence in the system. Despite important advances made in a dozen or more States, the operation of many of the courts in this country remains cumbersome and disjointed. As a specific example, in Passaic and Essex Counties, New Jersey, during March of 1965, the median times in felony cases from accusation to trial were approximately 13 and 12 months respectively. The report states that "these jurisdictions are not singled out as an extreme. Indeed, the fact that delay statistics are available at all indicates a degree of administrative management not available in many courts. *Id.* at 80. The decision to provide counsel for misdemeanants would require further time for trial and would create a severe strain on an already taxed court system.

The State of Utah urges this Court to consider other ramifications of a decision to extend counsel to misdemeanants. By extending counsel to misdemeanants, the case load on public defenders would be so great as to prevent adequate preparation. In view of the phenomenal increase in writs of habeas corpus alleging such complaints as ineffective counsel, involuntary guilty pleas, unintelligent waiver of counsel — counsel for indigent misdemeanants would be a vast new spawning ground for writs of habeas corpus.

Finally, in view of the steadily increasing crime rates, this Court should weigh the beneficial aspects of a requirement of counsel for every possible incarceration against the great need for effective law enforcement. Consideration must be given to the indirect expense of allocating such a massive amount of its legal and judicial resources to this singular area of concern.

III.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT DOES NOT REQUIRE THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS FACING A MAXIMUM PUNISHMENT OF LESS THAN SIX MONTHS.

The language of equal protection clause of the Fourteenth Amendment provides ". . . (n)or shall any State . . . deny to any person within its jurisdiction the equal protection of laws." However, meritorious the claim that "all men are created equal" this Court is not the proper forum to alleviate all social inequality throughout the Nation. Justice Harlan's dissent joined by Justice Steward in *Douglas* v. *California*, 372 U. S. 353 (1963) declared in part:

> The Equal Protection Clause does not impose on the States "an affirmative duty to lift the handicaps flowing from differences in economic circumstances. To so construe, it would be foreign to many of our basic concepts of the proper relations between government and society." *Id.* at 362.

No matter how much the State elects to furnish, persons with money can buy more.

Underlying the expansive view of the scope of equal protection is the theory that all defendants must be given an equal opportunity to be represented by counsel; that opportunity, self provided by the financially able, must be government provided for the indigent. According to *Griffin* v. *Illinois*, 351 U. S. 12 (1956) what is forbidden is allowing "the kind of trial a man gets" to depend "on the amount of money he has." *Id.* at 19. As stated in Junker, *The Right to Counsel in Misdemeanor Cases*, 43 *Wash. L. Rev.* 685 713 (1968) "that result is mandatory only if it can be shown that the financially able hire counsel in all such cases; for if they do not, financial ability is clearly irrelevant to the trial of such cases." In the vast majority of "misdemeanors" which also may entail a possible jail sentence, people who can afford attorneys do not do so.

Indeed, if counsel were extended to an indigent charged with a misdemeanor, it would be a denial of equal protection of laws to a non-indigent. The more advantages society extends to the indigent, the more apparent is the comparative disadvantage of being of modest means. Indigents who are provided with trial counsel, investigative services, trial expenses, and services for expert witnesses, are already receiving more than many non-indigents can afford. To extend counsel to indigents charged with a misdemeanor would be providing another substantial service, which those of modest means could not begin to afford.

Both *Griffin and Douglas*, supra, were cases challenging appellate procedures. While the financially able may be able to insist upon full prosecution of a frivolous appeal, in *Anders* v. *California*, 386 U. S. 738, 744 (1967) this Court held that the indigent is entitled only to counsels' "conscientious examination" of his case and to a brief referring to anything in the record that might arguably support the appeal. If equality on appeal need be attained only "as nearly as practicable," *Id.* at 745, equality at trial surely requires no more.

Equal protection of the law cannot be advanced by promising more than it can deliver. As previously stated, it is impossible to ignore the financial and manpower demands on the legal system that an "absolute" interpretation of the equal protection clause would impose. Furthermore, with crimes punishable by a maximum term of six months, the disparity referable to the absence of counsel is insubstantial.

CONCLUSION

The judgment of the Supreme Court of the State of Florida should be affirmed.

Respectfully submitted,

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No. 70-5015

In the Supreme Court of the United States

OCTOBER TERM, 1971

JON RICHARD ARGERSINGER, PETITIONER

v.

RAYMOND HAMLIN, SHERIFF, LEON COUNTY, FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70–5015

JON RICHARD ARGERSINGER, PETITIONER

v.

RAYMOND HAMLIN, SHERIFF, LEON COUNTY, FLORIDA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

After hearing argument in this case on December 6, 1971, the Court, on December 20, 1971, ordered re-argument and invited the Solicitor General to express the views of the United States. This brief is submitted in response to that request.

STATEMENT

This case arose out of an original habeas corpus action filed in the Florida Supreme Court (A. 1).[1]

On January 13, 1970, petitioner pleaded guilty to carrying a concealed weapon—brass knuckles— in violation of § 790.01(1), Fla. Stat., as amended, 1969, Laws of Florida (A. 4–5). That statute provides for punishment by a penalty of imprisonment for not less than

[1] "A." refers to the Joint Appendix filed in this Court.

three months nor more than six months or by a fine of not less than $500 nor exceeding $1,000, or by both fine and imprisonment (A. 5). Petitioner was sentenced "to pay a fine of $500, and in default of the payment of such fine and costs, to be imprisoned in the county jail [at hard labor] for a period of three months" (A. 4–5). Six days later, on January 19, 1970, petitioner was ordered committed to the county jail pursuant to the judgment (A. 7).

The following day petitioner, acting through an attorney, filed a habeas corpus action in the Supreme Court of Florida. He claimed that he was indigent at the time of his conviction, that he was unrepresented by counsel though he had not waived the assistance of counsel, and that he had a defense to the charges that he was unable as an indigent layman properly to raise and present (A. 1–2). After releasing petitioner on bail (A. 4) and hearing argument, the Florida Supreme Court, on June 3, 1970, discharged the writ (A. 8–11). Holding that an indigent defendant accused of a misdemeanor is entitled to court-appointed counsel only when the offense carries a possible penalty of more than six months' imprisonment, it ruled that petitioner was not entitled to relief since the maximum term of imprisonment provided by the statute under which he was convicted was six months, and petitioner was actually sentenced to three months.[2]

[2] The decision of the Florida Supreme Court antedated this Court's decisions in *Williams* v. *Illinois*, 399 U.S. 235, *Morris* v. *Schoonfield*, 399 U.S. 508, and *Tate* v. *Short*, 401 U.S. 395. No issue was raised below of the power of the state to imprison petitioner at hard labor for nonpayment of the fine. The constitutional status of petitioner's alternative sentence of

SUMMARY OF ARGUMENT

Nothing in the language or reasoning of *Gideon* v. *Wainwright,* 372 U.S. 335—which holds that the assistance of counsel is fundamental to a fair criminal trial and, therefore, that states must afford counsel to indigents under the Fourteenth Amendment—limits the scope of that decision to felonies. Since there is no sound reason for interpreting the Sixth Amendment to be less generous to defendants in granting assistance of counsel than a jury trial, the right of indigents to appointed counsel must, after *Duncan* v. *Louisiana,* 391 U.S. 145, and *Baldwin* v. *New York,* 399 U.S. 66, extend at least to all cases involving a possible sentence of imprisonment of more than six months.

We agree with petitioner that the right to assistance of counsel extends further, to all cases in which an indigent defendant may be deprived of his liberty. Since other Sixth Amendment rights, such as the right of confrontation and right to a speedy and public trial, plainly are applicable to offenses not involving more than six months imprisonment, there is no barrier to such a holding with respect to appointed counsel, whether the right is derived from the Sixth Amendment, or the Fifth and Fourteenth Amendment requirements of "due process." In earlier decisions extending the right to counsel, such as *Powell* v. *Alabama,* 287 U.S. 45, and *Johnson* v. *Zerbst,* 304 U.S.

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imprisonment under those decisions is not clearly settled, since petitioner's term of imprisonment was less than the maximum that could have been imposed for the offense. Compare *Williams* and *Tate*, with Mr. Justice White's concurring opinion in *Morris*, 399 U.S. at 509.

458, the Court has not limited the right to the scope contemplated by the Framers of the Constitution, but has looked rather to the fundamental character of the assistance of counsel to a fair trial. Since there is little doubt that counsel's aid may be highly valuable in respect to petty offenses, and deprivation of liberty, for whatever length, is regarded by society as a very serious penalty, indigents who may be subjected to that penalty should, as a constitutional right, have the opportunity to be assisted by counsel. Since fines, however, have an effect like other exactions and determinations with financial consequences which the state makes in nonjudicial settings with no right to appointed counsel, see, *e.g. Goldberg* v. *Kelly,* 397 U.S. 254, 270, and since even those who can afford to do so commonly do not employ counsel when the only likely penalty is a fine, the constitutional right to appointed counsel should not extend to petty offenses when only a fine is imposed.

If the right to appointed counsel were formulated in terms of all offenses for which imprisonment is authorized by statute, it would apply in many cases where imprisonment is not a realistic possibility. A right drawn in terms of likelihood of imprisonment viewed before the trial would not protect the defendant who "unexpectedly" receives a prison sentence, and would necessitate drawing an arbitrary line distinguishing degrees of "likelihood." Therefore, the right should be phrased to be applicable when the actual sentence is one of imprisonment, an approach parallel to that taken by the Court with respect to jury trial in criminal contempt cases. See, *e.g., Bloom* v. *Illinois,* 391 U.S. 194.

If the prosecutor or judge thinks there is any chance of a sentence of imprisonment, an indigent accused should be informed of his right to appointed counsel before pleading guilty or being tried.

Although the right to appointed counsel suggested here would go beyond what is now required under federal law, counsel is now provided in many petty offense cases and the applicable statute, 18 U.S.C. 3006A, is framed to accommodate an expanded constitutional right to appointed counsel. We are reasonably confident that the federal system could adjust to this right without great difficulty.

It is more difficult to estimate the likely effect on fifty different states. The recommendations of the American Bar Association and the President's Commission on Law Enforcement and Administration of Justice in favor of providing counsel in essentially the same circumstances urged here suggest that it could be practically implemented. The experience of states that already afford such a right, the simplicity of the issues in many petty offense cases, the high rate of guilty pleas, the ability of the states to comply with other expansions of the right to counsel, and the burgeoning number of attorneys in the country all point in the same direction. While we are concerned with the possibility that in some jurisdictions there may not be sufficient resources allocated to permit representation of the highest quality, we do not think that is a reason for withholding from indigents a valuable right which should otherwise be afforded.

457-546—72——2

ARGUMENT

THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION REQUIRE THAT AN INDIGENT DEFENDANT NOT BE DEPRIVED OF LIBERTY WITHOUT HAVING BEEN AFFORDED APPOINTED COUNSEL

In 1963, in *Gideon* v. *Wainwright,* 372 U.S. 335, this Court held that the provision of the Sixth Amendment that in all criminal prosecutions the accused shall enjoy the right to counsel is fundamental and essential to a fair trial and is therefore obligatory on the states under the due process requirement of the Fourteenth Amendment. In so ruling, this Court rejected the test adopted in *Betts* v. *Brady,* 316 U.S. 455, 462, under which "an appraisal of the totality of facts in a given case" was made to determine if appointment of counsel was necessary in state cases.

A. THE RIGHT TO APPOINTED COUNSEL WHEN AN INDIGENT MAY BE SENTENCED TO IMPRISONMENT FOR MORE THAN SIX MONTHS

Although, in passing, this Court has referred to *Gideon* as establishing "an absolute right to appointment of counsel in felony cases," *Mempa* v. *Rhay,* 389 U.S. 128 at 134, it has not held that the right does not extend to other cases. Nothing in the Sixth Amendment nor in the language or reasoning in *Gideon* would limit its holding to felonies. The United States agrees with both parties in this case that the rule of *Gideon* is not limited to felony cases.

This conclusion is a corollary of this Court's decision in *Duncan* v. *Louisiana,* 391 U.S. 145, that under the Sixth Amendment and Article 3, § 2 of the Constitution, the right to a jury trial for a serious offense,

whether categorized as a felony or misdemeanor, is fundamental and must under the Fourteenth Amendment be granted by the states. Instead of drawing a line between felonies and misdemeanors, the Court in *Duncan* drew one between serious offenses and petty offenses, indicating that jury trials need not be provided for the latter. It did not "settle in this case the exact location of the line between petty offenses and serious crimes" (*id.* at 161) [3]; though as one standard for distinguishing between these kinds of offenses it mentioned 18 U.S.C. 1, which for federal jurisdictions defines petty offenses as those punishable by no more than six months in prison and a $500 fine. In *Baldwin* v. *New York,* 399 U.S. 66, the Court definitely settled that a person charged with a crime where the possible penalty exceeds six months has a right to a trial by jury, even if the crime is a misdemeanor under state law.

Given the right to a jury trial for all cases involving a possible sentence of more than six months, the right to counsel under the Sixth and Fourteenth Amendments must extend at least to those cases.[4] There is no sound theoretical reason for interpreting the Sixth Amendment to be less generous to defendants in granting assistance of counsel than jury trial,

[3] See generally Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury,* 39 Harv. L. Rev. 917 (1926).

[4] We do not think extended discussion of this point, on which the parties and the court below agree, is necessary; the discussion in the remainder of the brief, suggesting that the right to appointed counsel is more extensive than the right to a jury trial is, of course, also relevant to our position that it is at least as extensive.

particularly in light of this Court's consistent position that the right to counsel is fundamental. See, *e.g.*, *Powell* v. *Alabama*, 287 U.S. 45; *Johnson* v. *Zerbst*, 304 U.S. 458; *Gideon* v. *Wainwright*, 372 U.S. 335. Practically, in light of the complexities of proceedings before a jury, the jury trial right would be of relatively little value without the guiding hand of counsel.

B. THE RIGHT TO APPOINTED COUNSEL WHEN AN INDIGENT MAY BE SENTENCED TO IMPRISONMENT FOR LESS THAN SIX MONTHS

We agree with petitioner, however, that the constitutional right to the assistance of counsel is not coextensive with the right to a jury trial but reaches further—to all cases in which an indigent defendant may be deprived of his liberty. We recognize that this position is not without some theoretical and practical difficulties, but we suggest that it represents a sounder interpretation of the Constitution than any other, and that it would not impose an unjustified or unmanageable burden on the bar or the courts.

Before developing in more detail the reasons that underlie this position, we consider and reject certain arguments that it would be inappropriate for this Court to hold that the Constitution guarantees a right to counsel whenever a person may be sentenced to imprisonment. Florida argues that since the rights to counsel and jury trial are both contained in the Sixth Amendment and it applies to "all criminal prosecutions," whatever cases are encompassed within the phrase "all criminal prosecutions" must be the same for the right to counsel as they are for the right to a jury trial. (Brief for Respondent 12–13). There is

much weight in this argument, but in response it may be said that the position is unduly literalistic and inconsistent with existing constitutional law. The constitutional term "criminal prosecutions" need not have a fixed and uniform meaning independent of the particular right asserted (cf. *Atlantic Cleaners & Dyers* v. *United States,* 286 U.S. 427, 433), which necessarily defines the boundaries of the cases to which a claimed right applies. In addition to the right to counsel and the right to jury trial, the Sixth Amendment contains a number of other rights, such as the right of confrontation and the right to a public and speedy trial. These are applicable to prosecutions for petty offenses as well as major offenses. See, *e.g., District of Columbia* v. *Clawans,* 300 U.S. 617; *In re Oliver,* 333 U.S. 257. It is perhaps a nice doctrinal question whether the undoubted applicability of those rights to charges for petty offenses is a direct consequence of the Sixth Amendment, in which event "criminal prosecutions" would refer to somewhat variant classes of cases depending on the Sixth Amendment right involved, or whether those rights are applicable to petty offenses because of the commands of the Fifth and Fourteenth Amendments that no person be deprived of "life, liberty, or property, without due process of law" See *Cooke* v. *United States,* 267 U.S. 517. The essential point, however, is that the rejection of a Sixth Amendment right to a jury trial for offenses involving a possibility of imprisonment for less than six months in no way compels the conclusion that there is no right on the part of indigents to have appointed counsel in such cases.

Indeed the opinions in *Duncan* v. *Louisiana*, 391 U.S. 145, and *Baldwin* v. *New York*, 399 U.S. 66, did not rest finally on some fixed definition of "criminal prosecutions" but upon the necessity of accommodating the desirability of community participation in determinations of criminal guilt with the need for effective judicial administration. In *Duncan*, the Court said:

> * * * the possible consequences to defendants from convictions for petty offenses have been thought insufficient to outweigh the benefits to efficient law enforcement and simplified judicial administration resulting from the availability of speedy and inexpensive nonjury adjudications. * * * [391 U.S. at 161.]

And in *Baldwin* the Court referred to the *Duncan* holding as follows:

> Where the accused cannot possibly face more than six months' imprisonment, we have held that * * * disadvantages, onerous though they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications. [399 U.S. at 73.]

The court, in *Duncan*, did make reference to historical practice in delimiting the boundaries of the jury trial right (391 U.S. 151–154) but that was only one element of its approach; with respect to the right to counsel, the Court, explicitly or implicitly, has consistently declined to confine the right to its historical content at the time of the adoption of the Constitution. The holding in *Powell* v. *Alabama*, 287 U.S. 45, that indigents in some circumstances are entitled to appointed counsel rests on an assessment of the necessities for a fair

hearing, not on a showing that due process was in 1789 understood to include a right to appointed counsel. In *Johnson* v. *Zerbst,* 304 U.S., 458, the Court established the Sixth Amendment right to appointed counsel, despite the absence of historical evidence that the Framers intended such a right.[5] More recent decisions such as *Hamilton* v. *Alabama,* 368 U.S. 52, *Escobedo* v. *Illinois,* 378 U.S. 478, *Miranda* v. *Arizona,* 384 U.S. 436, *United States* v. *Wade,* 388 U.S. 218, and *Mempa* v. *Rhay,* 389 U.S. 128, clearly do not depend on analysis of the historical content of the right to counsel. It is thus consistent both with the decisions on jury trial and with the development of the right of counsel for this Court to determine the boundaries of the cases to which that right applies on the basis of a sensitive assessment of the necessary prerequisites for a fair trial in light of the need for efficient administration of criminal justice. Under such an approach, we suggest that the assistance of counsel must be supplied to indigents who wish it if they are to be sentenced to imprisonment.

The decisions of this Court establish that the right to counsel is one of the fundamental elements of a fair criminal trial. As this Court said many years ago in *Powell* v. *Alabama,* 287 U. S. 45, 68–69:

> What, then, does a hearing include? Historically and in practice, in our own country at least, it has always included the right to the aid of counsel when desired and provided by the party asserting the right. The right to be heard would

[5] The materials summarized in Beaney, *The Right to Counsel in American Courts*, pp. 27–30, suggest rather strongly that a constitutional right to appointed counsel was not contemplated.

> be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. * * *

While the elements of proof for petty offenses may often be simpler than those for more serious offenses, there is little reason to doubt that counsel can be of great help for those charged with petty offenses. Although exhaustive statistics have not been compiled, study suggests that a significantly higher percentage of defendants with counsel receive favorable dispositions in petty offense cases than those without counsel. (See App. A to Brief of the Legal Aid Society of New York). In some instances important and complex issues of constitutional law are involved in conviction for petty offenses (see, *e.g.*, *Thompson* v. *Louisville*, 362 U.S. 199; *Powell* v. *Texas*, 392 U. S. 514). It may require special efforts by counsel to raise and pursue these claims; certainly they would not occur to unin-

formed laymen. Even with respect to more routine cases, counsel may be important to ensure fairness. The Task Force Report on *Drunkenness* of the President's Commission on Law Enforcement and Administration of Justice, pp. 3–4, commented that, "One major reason" why "[t]he handling of drunkenness cases in court hardly reflects the standards of fairness that are the basis of our system of criminal justice" "is that counsel is rarely present."[6] Similar conclusions have been reached about the processing of vagrancy and loitering charges. See *e.g.*, Foote, *Vagrancy-Type Law And Its Administration,* 104 U. Pa. L. Rev. 603 (1956).

The right to counsel is thus significantly different from the right to trial by jury. Although the principle of community participation in determinations of guilt is important, it is possible to have a fair trial before a judge alone. But a trial, whether before a judge, or judge and jury, is an adversary proceeding, and the right to counsel affects what either judge alone, or judge and jury, will hear. The risk of an unfair trial in an adversary proceeding where the defendant by reason of poverty is deprived of counsel can be as great in a trial before a judge alone as in a trial before a jury. Moreover, a crucial step in the criminal process is the decision of the accused whether or not to plead guilty, and it is difficult to make an informed decision without the advice of counsel. As

[6] In 1965 there were two million arrests for public drunkenness, one-third of the total arrests (Task Force Report on *Drunkenness*, p. 1); although many of those arrested are not tried or convicted (*id.* at pp. 2–3), clearly public drunkenness is one of the most frequently prosecuted petty offenses.

Mr. Justice Harlan put it, "The Court has held, properly I think, that in an adversary process it is a requisite of fairness, for which there is no adequate substitute, that a criminal defendant be afforded a right to counsel * * *" (*Duncan* v. *Louisiana,* 391 U.S. 145, 187 (dissenting)).

In *Powell* v. *Alabama,* the Court wrote, "If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense" (287 U.S. at 69). With very narrow exceptions, including grand jury proceedings and certain kinds of administrative inquiries (*In re Groban,* 352 U.S. 330), the right to appear by counsel of one's choice in every kind of legal action is well established (see, *e.g., Goldberg* v. *Kelley,* 397 U.S. 254, 270–271) and obviously it encompasses petty criminal prosecutions. We do not suggest that there is a constitutional right to appointed counsel in every instance in which there is a constitutional right to appear by counsel of one's choice. (Even those who can afford to do so often do not employ counsel for matters of less than crucial importance, since they must weigh the prospective cost of hiring counsel against the likely benefit of his services; it would be an unworkable and unsound rule to afford indigents free counsel, as a constitutional right, for every matter with respect to which a nonindigent might employ counsel at a cost.) But we do suggest that when something as crucial is at stake as a deprivation of liberty, pursuant to a

criminal conviction, it is unconstitutional to leave indigents who want the assistance of counsel unaided by counsel.

As this Court said in *Baldwin* v. *New York,* "the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result in quite serious repercussions affecting his career and his reputation" (399 U.S. 66, 73). The seriousness with which a penalty is regarded may be difficult to establish by simple empirical data; but we suggest that the Court can appropriately notice that imprisonment of any duration is generally considered a serious penalty. With the single exception of civil contempt,[7] persons are not imprisoned unless convicted of criminal acts or held pending trial for criminal acts. This is one indication of how gravely imprisonment is regarded by society. It would be thought extraordinary for someone facing imprisonment who could afford counsel to decline to seek counsel's aid because he considered the penalty not serious enough to justify the cost. This is another indication of how the penalty is viewed and perhaps one particularly relevant to this case. Imprisonment, unlike a fine, involves a complete disruption of normal life, separation from family and friends, absence from employment and very frequently loss of job.

Even if we considered imprisonment for a few days to be less grave than this discussion indicates, we

[7] The person confined civilly, unlike the convicted criminal, can gain release by performing what the court has ordered, and thus purging himself of the contempt. He carries "the keys of [his] prison in [his] own pocket" (*Shillitani* v. *United States*, 384 U.S. 364, 368).

would suggest that certainly four or five months imprisonment is too severe a penalty to impose on an indigent who lacks the opportunity to have the assistance of counsel; and if there is to be a constitutional right to counsel in such cases, we perceive no place to draw the line short of holding that the right exists when imprisonment of any length is involved.[8]

We think the Court may also take notice that most fines, particularly those typically imposed for petty offenses, are not regarded as seriously as imprisonment by most persons. It is a rare case in which a person with an alternative of a fine or jail sentence willingly chooses imprisonment. In their effect, fines are not essentially different from other financial executions imposed on individuals by the state through noncriminal processes. When persons charged with petty offenses do not expect imprisonment, it is not at all unusual for them to act without counsel, even though they could comfortably afford to hire counsel. See Junker, *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, 713–714 (1968).

The principle that indigents who face imprisonment should have a right to the assistance of counsel is implied not only by the import of *Gideon* v. *Wainwright,* 372 U.S. 335, and *In re Gault*, 387 U.S. 1, which focus on the intrinsic importance of counsel to a fair trial, but also by cases employing an equal pro-

[8] The line between more than six months' and less than six months' imprisonment is based largely on history and present practice in most jurisdictions, see, *e.g.*, *Baldwin* v. *New York*, 399 U.S. 66, but that line is inappropriate for the right to counsel, and there is no other short of that between different terms of imprisonment that does not seem arbitrary.

tection analysis, which indicate that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Griffin* v. *Illinois,* 351 U.S. 12, 19 (plurality opinion of Black, J.). See *Douglas* v. *California,* 372 U.S. 353, and *Miranda* v. *Arizona,* 384 U.S. 436, applying that essential concept to a right to counsel. Affording an indigent who faces imprisonment the opportunity to have counsel has been urged by the American Bar Association, in its Minimum Standards for Criminal Justice, *Providing Defense Services,* Section 4.1:

> Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors, or otherwise.

And in slightly different language the President's Commission on Law Enforcement and Administration of Justice recommended that:

> The objective to be met as quickly as possible is to provide counsel to every criminal defendant who faces a significant penalty, if he cannot afford to provide counsel himself. This should apply to cases classified as misdemeanors as well as those classified as felonies. * * * The immediate minimum, until it becomes possible to provide the foregoing, is that all defendants who are in danger of substantial loss of liberty shall be provided with counsel. [*The Challenge of Crime in A Free Society,* p. 150.]

Such thoughtful conclusions do not, of course, establish a rule of constitutional law, but they do reflect

a persuasive assessment of the importance of loss of liberty and estimation of the standards for minimal fairness in the criminal process. They thus lend strong support to a constitutional principle drawn from *Gideon, Griffin, Douglas* and *Gault*. In *Gault*, the Court, considering juvenile delinquency proceedings, formulated a right very close to that suggested here; holding that juveniles have a constitutional right to appointed counsel in "proceedings to determine delinquency which may result in commitment to an institution in which the juvenile's freedom is curtailed." 387 U.S. at 41.

As we have indicated earlier, we do not think that these cases or the principle urged would require the government to supply counsel to indigents in every petty offense proceeding in which a person has a right to appear by counsel of his choice. Since the state imposes exactions, and makes other determinations with financial consequences much more serious than the typical fine for a petty offense, in nonjudicial settings and with no right to appointed counsel (*e.g., Goldberg* v. *Kelly*, 397 U.S. 254, 270), we suggest that neither the Sixth nor the Fifth Amendment guarantees indigents a right to counsel for petty offenses when imprisonment is not imposed.[9]

[9] Conceivably there might be extraordinary circumstances in which the collateral consequences of a conviction not involving imprisonment were so severe that a right to appointed counsel might arguably exist either prior to the conviction itself or before the consequences could attach (cf. *Mayer* v. *City of Chicago*, No. 70–5040, decided December 13, 1971) but that possibility is not one the Court need consider to decide this case.

Despite the argument developed thus far, we recognize that a right to appointed counsel must depend in part on the possibility that counsel can in fact be afforded. However appealing, the argument for counsel must be rejected if it is impossible for the courts and the bar to provide counsel. In a subsequent section, we consider in more detail the practical implications of the position urged here, focusing particularly on the federal system, but we note at this point that supplying counsel may well be less complicated and expensive for society than providing a jury trial and that the relevant facts in most petty offense cases are simpler than those in more serious crimes, and adequate representation for the former would ordinarily be less time-consuming than adequate representation for the latter. Before further discussing the practical aspects of an expanded right to appointed counsel, we turn to a related and troubling aspect of the problem, the precise scope of the right urged here.

C. FORMULATION OF THE RIGHT

If legislatures had conveniently provided that less serious petty offenses could be punished only by fines, and had reserved imprisonment for those offenses for which imprisonment is the common penalty, indigents charged with the latter offenses would have to be offered counsel. Typically, however, legislatures have provided the possibility of imprisonment upon conviction of petty offenses for which that penalty is very rarely imposed. For example, in New York City in 1969 less than 40 of 1,800,000 persons convicted of jaywalking, speeding, and certain other traffic viola-

tions were incarcerated or given a suspended sentence. Criminal Court of the City of New York, Annual Report of 1969, p. 13, Table 3, line 11.

With respect to the right to a jury trial for crimes defined by statute, this Court has focused on the maximum authorized penalty (see *e.g., Duncan* v. Louisiana, *supra*) : in this area that approach might require appointment of counsel in a vast number of cases in which the possibility of imprisonment is exceedingly remote. As a consequence, a somewhat more flexible standard is required, one similar to that governing jury trial for criminal contempt (*e.g., Cheff* v. *Schnackenberg*, 384 U.S. 373; *Bloom* v. *Illinois*, 391 U.S. 194), that rests on the actual penalty imposed. The constitutional right we suggest is that no one can be imprisoned for a petty offense without being informed that he has a right to counsel, which includes a right to have appointed counsel if he is indigent. Although this Court need not now resolve every conceivable question raised by this standard, we deem it desirable to explore this and alternative formulations sufficiently to show that it is a viable constitutional standard and preferable to possible alternatives.

There are three basic alternatives, assuming acceptance of the underlying principle of a right to appointed counsel for persons facing imprisonment. One is to require appointment on behalf of an indigent who wishes counsel whenever the statute authorizes imprisonment. That approach would mean appointment even for offenses in which imprisonment is not a realistic possibility and for which most persons who can afford counsel do not appear by counsel. A second alterna-

tive, that chosen by the American Bar Association,[10] is to require appointment in respect to offenses likely to result in imprisonment. One difficulty with making the right to counsel turn on the likelihood of imprisonment, viewed before a plea of guilty or trial, is that it would not protect the accused who "unexpectedly" receives an infrequently imposed sentence of imprisonment. It may be precisely in such situations of defendants singled out for unusually severe penalties that counsel would have been most useful. In any event, if it is unconstitutional to allow someone to be imprisoned without counsel when that is "foreseen," it can not be constitutional to allow imprisonment when it is "unforeseen." This difficulty with a "likelihood" standard could be rectified by making the right turn on either "likelihood" or actual sentence, but

[10] In its commentary, Minimum Standards for Criminal Justice, *Providing Defense Services*, p. 40, the Bar Association stated:

> As a matter of sound judicial administration it is preferable to disregard the characterization of the offense as felony, misdemeanor or traffic offense. Nor is it adequate to require the provision of defense services for all offenses which carry a sentence to jail or prison. Often, as a practical matter, such sentences are rarely if ever imposed for certain types of offenses, so that for all intents and purposes the punishment they carry is at most a fine. Thus, the standard seeks to distinguish those classes of cases in which there is real likelihood that incarceration may follow conviction from those types in which there is no such likelihood. It should be noted that the standard does not recommend a determination of the need for counsel in terms of the facts of each particular case; it draws a categorical line at those *types* of offenses for which incarceration as a punishment is a practical possibility. *Cf.* Williams v. Commonwealth, 216 N.E.2d 779 (Mass. 1966).

there is another less solvable problem. The assumption of a "likelihood" approach is that if imprisonment is reasonably likely, viewed prospectively, then there is a right to appointed counsel for indigents. If that were the constitutional standard, a failure to appoint counsel would be unconstitutional even if imprisonment were in fact not imposed. The constitutional right would rest, then, on the percentage of cases within the class for which an accused is prosecuted in which imprisonment results. Although as a matter of legislation or administration, such an approach may be sound, we do not understand how this Court would draw the line at which the percentage is "high enough" for the right to counsel to attach, nor do we think such a line would have a sound basis in constitutional principle.[11]

Focus on the actual sentence imposed is similar to the approach taken for jury trial in criminal contempt cases and avoids the difficulties of the two alternatives. In a case in which a prosecutor or a judge believed at the outset there was any likelihood of a sentence of imprisonment, the accused would be informed of his right to counsel and to have counsel appointed if he is indigent.[12] No sentence of imprison-

[11] This would be quite different from a line drawn between terms of maximum authorized penalty, see *Duncan* v. *Louisiana*, *supra*, and *Baldwin* v. *New York*, *supra*, which derives from the historical definition and treatment of different classes of crimes and does not require the Court to draw an essentially arbitrary mathematical line.

[12] Although such an approach would give the prosecutor some power over whether a sentence of imprisonment were imposed, he already has very great practical power in this respect by deciding whether to charge a person and what crime

ment could be imposed in the absence of such a warning to an accused,[13] at least without another trial.[14] A state could avoid the complexity of predicting a likely sentence by providing an opportunity for counsel in all cases where imprisonment is now authorized, or by redefining petty offenses so that with

to charge, and in recommending a sentence to the judge, either after a plea bargain or in other circumstances. The effective setting of a maximum sentence by an initial determination of what procedure to follow would not be novel since that occurs in any criminal contempt case tried without a jury.

[13] In order to avoid a problem of reverse discrimination, the warning of possible imprisonment presumably would also have to be given to nonindigents, so that they could make their decision whether to hire counsel with the same information as an indigent would have.

[14] There might be rare cases, presumably among those going to trial rather than resulting in guilty pleas, in which the facts as developed would suggest to the judge the appropriateness of a prison sentence he had thought not at all likely at the beginning of trial. Such cases could be reduced to a bare minimum if all initial doubts in the first instance about likely sentence were resolved in favor of granting counsel. If a state wished to provide that a judge could impose imprisonment even though an opportunity for counsel had not been afforded, that might be constitutional if the defendant were entitled to a trial *de novo* with counsel. Some problems with such a procedure would be that if the second trial were before the same judge, he might no longer be openminded about the case; and the prosecutor might make use of evidence coming out at the first trial because defendant was uncounseled. But these difficulties might not render the procedure itself unconstitutional. Such a procedure probably would not offend the prohibition against double jeopardy, because the second trial would be held at the request of a convicted defendant. A very similar procedure exists in states which provide an initial trial for certain misdemeanors before a justice of the peace who may be a layman and grant a right to trial *de novo* before a legally trained judge in a court of record. See, *e.g.*, Mississippi Code of 1942, as amended, §§ 1202, 1617. But cf. *Callan* v. *Wilson*, 127 U.S. 540.

respect to offenses rarely involving imprisonment the conditions of aggravation under which imprisonment would be appropriate would be legislatively determined. But even if jurisdictions did not take these steps, a constitutional rule which turned on the actual sentence imposed[15] would be workable. In practical effect, it would probably not be very different from the "likelihood" approach, since the initial determination by prosecutor and judge whether imprisonment might be imposed would typically turn on the usual treatment of similar offenses, but would be constitutionally more sound.

D. EFFECT ON THE FEDERAL SYSTEM

It is impossible to ascertain the precise effect on the courts and the bar of a rule that an indigent has a constitutional right to the assistance of counsel before being sentenced to prison. We are persuaded, however, that the need for counsel that such a principle would entail can be met, and that whatever burden is likely to be imposed is outweighed by the reasons that underlie the establishment of the right to counsel.

We begin with a discussion of the federal system. Federal courts have three different sorts of jurisdiction over petty offenses. In areas such as the District of Columbia, where the local law is federal, petty offenses cover much the same range of behavior as in most municipalities, including disorderly conduct,

[15] An exception might be crimes so serious the maximum authorized penalty was more than six months. Under *Baldwin* v. *New York*, *supra*, counsel well might be required in such cases even in the absence of an actual sentence of imprisonment.

gambling, prostitution, liquor offenses, violations of business, health, and building codes, and traffic offenses. See, *e.g.*, 40 D.C. Code §§ 104, 301, 605 and 609 (traffic offenses); 22 D. C. Code 1121 (disorderly conduct) and 25 D. C. Code 128 (drinking alcoholic beverages on street). Other federal courts enforce local state law under the Assimilative Crimes Statute, 18 U.S.C. 13. Finally there are petty offenses in the United States Code applicable to the entire country. These are defined as "Any misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both" (18 U.S.C. 1), and include such widely diverse offenses as temporarily landing in the United States without proper authorization (8 U.S.C. 1282), shipping fruits or vegetables in barrels of less than standard capacity (15 U.S.C. 235), and using the Swiss Confederation coat of arms for commercial purposes (18 U.S.C. 708).[16] Although we believe that the great majority of petty offenses tried in the federal judicial system are traffic offenses and park violations, essentially similar to the kinds of offenses tried by state courts, there are no accurate statistics on the subject.[17] Having directed a

[16] A complete list of petty offenses was compiled by the Administrative Office of the United States Courts in 1966. See also Hearings Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary on S. 3475, 89th Cong., 2d Sess., and on S. 945, 90th Cong., 1st Sess., pp. 284–305.

[17] Immigration cases probably constitute less then 5 per cent of federal petty offenses, but are the largest category of uniquely national violations. Since imprisonment is much more frequently imposed with respect to these than traffic and park violations, they make up a considerably higher proportion of the offenses for which imprisonment results.

study of the operation of the Criminal Justice Act of 1964, Professor Dallin Oaks informed the Senate Judiciary Committee in 1969 (Hearings on S. 1461, 91st Cong., 1st Sess., p. 329):

> So far as we are aware, there are no statistics on the number and type of petty offenses in the Federal courts. The category unquestionably includes an assortment of offenses that are handled on the state level by police or traffic courts. On the basis of our observation and the impressions of those with whom we have discussed the matter, we are of the opinion that a very high proportion of the petty offenses being heard in the Federal judicial system, perhaps as high as 90 percent, are traffic violations for which the penalty is a fine only. Most are heard by commissioners. For example, the U.S. commissioner in San Francisco estimates that his office has approximately 55 such cases per week, almost all relating to offenses committed at the Presidio or Treasure Island, two major military installations within his jurisdiction. Similarly, District of Columbia traffic tickets are all processed as petty offenses. Finally, we have the impression that almost all defendants throughout the Federal system undergo petty offense proceedings without the benefit of counsel, and this presumably includes many defendants who could afford counsel. * * *

Under 18 U.S.C. 3006A, a "person financially unable to obtain adequate representation" has a right to appointed counsel compensated by the government for all felonies and misdemeanors other than petty offenses and for a case in which "the Sixth Amendment to the Constitution requires the appointment

of counsel or * * * in a case in which [the accused] faces loss of liberty, any Federal law requires the appointment of counsel." The Act, in many respects, is generous in the representation it directs the courts to provide, reaching persons charged with violations of probation or parole or in custody as material witnesses and including not only counsel but investigative, expert and other services necessary to an adequate defense. Although the Act does not require the provision of compensated counsel for petty offenses, the open-ended subsection governing cases controlled by the Sixth Amendment, passed in 1970 (P.L. 91–447, 84 Stat. 916), reflects congressional awareness of the possible development of a right to appointed counsel for those offenses, and is designed to accommodate any such development within the statutory scheme.

Rule 44(a) of the Federal Rules of Criminal Procedure already provides that "[e]very defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him * * *." [18] As the Advisory Committee Note to the 1966 amendments recognized, this rule is broader than the statutory right to counsel created by Congress. Since a person accused of a petty offense has a right to be tried in the district court, see Rule 3 of the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates, 400 U.S. 1037, 1038, he has a right to appointed counsel if he chooses that course. If he chooses to be

[18] These rules do not apply to proceedings under 18 U.S.C. 3401, 3402, relating to petty offenses on federal reservations. Rule 54(b)(4), Fed. R. Crim. P. or to cases tried before magistrates.

tried by the magistrate, he has a "right to counsel," Rule 3, but no provision is made for appointed counsel. Some of the Federal Public Defender officers now assist in a considerable number of petty offense cases; they indicate informally that the added burden is not significant and that in some of the cases, on the basis of rather brief contacts, they have given legal assistance of great value. Rule 44 of the Rules of Criminal Procedure for the Superior Court of the District of Columbia, which tries petty offenses there, follows the federal rule providing for assignment of counsel in all cases; since the Public Defender can represent only those punishable by more than six months' imprisonment, 2 D.C. Code 2222 (Supp. IV, 1971), assignment in other cases must be of private attorneys.

Given the extent of the right of appointed counsel that already exists in the federal system, legislation which is framed to accommodate a right expanded to petty offenses, the manageable number of petty offenses (probably in the range of a few hundred thousand annually) tried in the federal courts, and the much smaller number for which imprisonment is a realistic possibility, we are reasonably confident that these courts could adjust to the constitutional principle urged here without great difficulty.

E. EFFECT ON THE STATES

It is harder to assess with any degree of precision the impact of that principle on the administration of justice in the fifty states, but we think there is a sound basis for concluding that the burden would not be insuperable or unjustifiably heavy. Generally speaking, the provision of counsel to a defendant is

not as expensive or as complicated as providing for a jury trial. The recommendations of the American Bar Association and the President's Commission on Law Enforcement and Administration of Justice, *supra,* that counsel be afforded in essentially the same circumstances as suggested here reflect a judgment by well qualified bodies made up of persons from all areas of the country and with a wide diversity of experience that counsel can feasibly be provided in these circumstances; on this score the recommendations are obviously entitled to considerable weight. As mentioned earlier, the issues in many petty offenses are relatively simple: was the accused publicly drunk? or engaging in prostitution? Counsel can give possibly valuable advice in such cases and even conduct a trial in much less time than appropriate representation would take for most serious felonies. And we see no reason to think that the advent of appointed counsel would significantly decrease the very high percentage of these cases disposed of by guilty pleas, given the simplicity of the issues and the continued high rate of guilty pleas for serious offenses in which counsel is now afforded as a matter of right. And, of course in many cases the right to counsel will be waived. Although each state differs, the supposition that states can afford to provide counsel in the cases suggested here is strongly supported by the fact that California, New York, Illinois, Massachusetts, Minnesota, New Hampshire and Texas already provide a right to appointed counsel in all or most cases in which incarceration is a realistic possibility (see Pet. Br. 14, 16, 19, 20, 22,

25–26; Brief of the Legal Aid Society of New York, Amicus Curiae, p. 2, note 1; Junker *The Right to Counsel in Misdemeanor Cases,* 43 Wash. L. Rev. 685, App. 732–734. The ability of the states to meet the expansions of the constitutional right to appointed counsel to all felony cases, to pretrial interrogation and line-up, and to appellate review probably implies a capacity to adjust to a further expansion of the right to counsel.

Although we are highly skeptical of the precision of statistical assessments of the impact of the proposed constitutional standard, we note that, based on the analysis of the Task Force Report on *The Courts,* pp. 55–56, of the President's Crime Commission, of the time of handling different kinds of cases, it has been estimated that the representation of all indigent misdemeanants, not including traffic violators, would require 1,575 to 2,300 full-time counsel (Note, *Dollars and Sense of an Expanded Right to Counsel,* 55 Iowa L. Rev. 1249, 1260–1261 (1970)). If counsel was provided only when imprisonment was likely, this figure obviously would be substantially reduced.[19] Viewed against the less than 5,000 lawyers in the country whom it is estimated take criminal cases more than occasionally (*id.* at 1259), this added burden would still be significant. However, it is much less so viewed against the country's estimated 342,935 attorneys, expected to double by 1985, and the 18,000

[19] Based on careful statistical analysis of areas where appointed counsel is afforded in misdemeanor cases, the brief for the National Legal Aid and Defense Association, Amicus Curiae, pp. 7–16, persuasively concludes that the burden on the bar of an extended right to counsel is much less than frequently supposed.

new admissions to the bar each year. See Ruud, *That Burgeoning Law School Enrollment,* 58 A.B.A.J. 146, 147. The problem raised by providing indigents facing imprisonment with counsel is not one of some absolute limit on monetary resources or legal talent that might preclude fulfillment of the right—indeed "the estimated 14,500 average annual openings [for lawyers] are significantly below the estimated new admissions to the Bar" (*id.* at 148). The problem, rather, is one involving an allocation of resources which is solvable if society expends sufficient resources to pay enough members of public defender or legal aid offices or to reimburse private appointed counsel, or instead spreads the responsibility of *gratis* representation broadly enough among members of the bar.

This problem raises what perhaps is the most troublesome practical aspect of extending the right to appointed counsel to petty offenses. Criminal defense lawyers are already overworked and the quality of representation is often deficient. The Task Force Report on *The Courts,* p. 32, commented:

> As has been noted, in many lower courts defense counsel are not provided for defendants without funds. In those places where counsel are assigned, frequently he is not compensated and often his performance is poor. A community gets the kind of legal service it pays for, and typically it pays little or nothing for defense counsel in its lower court.
>
> Attorneys operating regularly in these courts rarely appear in other courts. Often they seem to be more concerned with extracting a fee from their clients than with defending them.

> They operate on a mass production basis, relying on the plea of guilty to dispose of cases quickly. Frequently these lawyers are unprepared, make little contact with their clients, fail to investigate their backgrounds, and make little effort aside from the plea bargaining session to protect their interests or to secure a favorable disposition.

And where legal aid and public defender offices operate, a heavy caseload strains their ability to provide representation of the highest quality. It is conceivable that in some instances an expanded right to counsel would result in an even greater caseload that would force at least a temporary dilution in the quality of representation.

Although it would be unduly sanguine not to view this prospect with concern, we do not think it militates against holding that there is a constitutional right to appointed counsel for indigents who may be imprisoned. Most fundamentally, since the aid of counsel is an essential element of a fair criminal trial, it would be mistaken to reach a constitutional decision withholding the right to that assistance when it is feasible for society and the bar to provide it, solely because in some jurisdictions those responsible are not willing to allocate the necessary resources to make the right fully effective. The assumption must be that the other organs of government will respond to this Court's interpretation of what is constitutionally required, and that they will expend the necessary minimal resources. Whatever burden is imposed may be ameliorated if states and municipalities carefully

consider what offenses, or aggravated forms of offenses, really merit imprisonment, and draft their statutes and ordinances accordingly. And it may well be that the kind of representation required for certain petty offenses would not necessarily involve members of the Bar, but might be handled by law students or other trained personnel.

The problem raised by a decision extending counsel to petty offenses for which imprisonment may be imposed raises precisely the same kind of need in respect to the allocation of legal resources as other recent decisions expanding the right to counsel, which, so far as we are aware, have not caused any deterioration in the quality of representation. The conceivable possibility of that occurring did not preclude the Court from making decisions like *Gideon* v. *Wainwright, supra, Douglas* v. *California, supra,* and *United States* v. *Wade, supra;* nor, though on a national level the magnitude of the effect on the bar might be greater, do we think that possibility should preclude the Court from recognizing the right to counsel for indigents subject to imprisonment.

We recognize that the time spent by appointed lawyers on most petty offenses may not be very great; but frequently lawyers by giving advice about pleading guilty or consulting briefly with the prosecutor may give valuable assistance to an accused, and they may be in a position to forestall summary conviction of those defendants, perhaps comparatively few, against whom a serious miscarriage of justice might otherwise result. We are struck by the Task Force's conclusion *supra,* at p. 32, that even shoddy

representation is usually better than none at all, and we trust that most jurisdictions will work out representation much better than that described in the quoted portion of the Report. In any event, that better assistance might be provided in petty offenses cases would not be a proper ground for finding indigents not to be entitled to minimal assistance that would often be of considerable valuable.

In summary, recognizing that there will be troublesome practical aspects to effectuating the right, we suggest that the fundamental character of counsel's assistance for fair criminal trials should lead this Court to hold that there is a constitutional right to appointed counsel for indigents who may be sentenced to imprisonment.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully submitted.

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FEBRUARY 1972.

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NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

ARGERSINGER *v.* HAMLIN, SHERIFF

CERTIORARI TO THE SUPREME COURT OF FLORIDA

No. 70–5015. Argued December 6, 1971—Reargued February 23, 1972—Decided June 12, 1972

The right of an indigent defendant in a criminal trial to the assistance of counsel, which is guaranteed by the Sixth Amendment as made applicable to the States by the Fourteenth, *Gideon* v. *Wainwright*, 372 U. S. 335, is not governed by the classification of the offense or by whether or not a jury trial is required. No accused may be deprived of his liberty as the result of any criminal prosecution, whether felony or misdemeanor, in which he was denied the assistance of counsel. In this case, the Supreme Court of Florida erred in holding that petitioner, an indigent who was tried for an offense punishable by imprisonment up to six months, a $1,000 fine, or both, and given a 90-day jail sentence, had no right to court-appointed counsel, on the ground that the right extends only to trials "for nonpetty offenses punishable by more than six months imprisonment." Pp. 2–14.

236 So. 2d 442, reversed.

DOUGLAS, J., delivered the opinion of the Court, in which BRENNAN, STEWART, WHITE, MARSHALL, and BLACKMUN, JJ., joined. BRENNAN, J., filed a concurring opinion, in which DOUGLAS and STEWART, JJ., joined. BURGER, C. J., filed an opinion concurring in the result. POWELL, J., filed an opinion concurring in the result, in which REHNQUIST, J., joined.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 70–5015

Jon Richard Argersinger, Petitioner, *v.* Raymond Hamlin, Sheriff, Leon County, Florida. } On Writ of Certiorari to the Supreme Court of Florida.

[June 12, 1972]

MR. JUSTICE DOUGLAS delivered the opinion of the Court.

Petitioner, an indigent, was charged in Florida with carrying a concealed weapon, an offense punishable by imprisonment up to six months and a $1,000 fine. The trial was to a judge and petitioner was unrepresented by counsel. He was sentenced to serve 90 days in jail and brought this habeas corpus action in the Florida Supreme Court, alleging that, being deprived of his right to counsel, he was unable as an indigent layman properly to raise and present to the trial court good and sufficient defenses to the charges for which he stands convicted. The Florida Supreme Court by a four-to-three decision, in ruling on the right to counsel, followed the line we marked out in *Duncan* v. *Louisiana*, 391 U. S. 145, 159, as respects the right to trial by jury and held that the right to court-appointed counsel extends only to trials "for nonpetty offenses punishable by more than six months imprisonment." 236 So. 2d 442, —.[1]

[1] For a survey of the opinions of judges, prosecutors, and defenders concerning the right to counsel of persons charged with misde-

The case is here on a petition for certiorari which we granted. 404 U. S. —. We reverse.

The Sixth Amendment, which in enumerated situations has been made applicable to the States by reason of the Fourteenth Amendment (see *Duncan* v. *Louisiana, supra; Washington* v. *Texas,* 388 U. S. 14; *Klopfer* v. *North Carolina,* 386 U. S. 213; *Pointer* v. *Texas,* 380 U. S. 400; *Gideon* v. *Wainwright,* 372 U. S. 335; and *In re Oliver,* 333 U. S. 257), provides specified standards for "all criminal prosecutions."

One is the requirement of a "public trial." *In re Oliver, supra,* held that the right to a "public trial" was applicable to a state proceeding even though only a 60-day sentence was involved. 333 U. S., at 272.

Another guarantee is the right to be informed of the nature and cause of the accusation. Still another, the right of confrontation. *Pointer* v. *Texas, supra.* And another, compulsory process for obtaining witnesses in one's favor. *Washington* v. *Texas, supra.* We have

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meanors, see I Silverstein, Defense of the Poor in Criminal Cases in American State Courts, pp. 127–135 (1965).

A review of federal and state decisions following *Gideon* is contained in Comment, Right to Counsel; The Impact of Gideon v. Wainwright in the Fifty States, 3 Creighton L. Rev. 103 (1970).

Twelve States provide counsel for indigents accused of "serious crime" in the misdemeanor category. *Id.,* pp. 119–124.

Nineteen States provide for the appointment of counsel in most misdemeanor cases. *Id.,* pp. 124–133. One of these is Oregon whose Supreme Court said in *Application of Stevenson,* — Ore. —, 458 P. 2d 414, 418, "If our objective is to insure a fair trial in every criminal prosecution, the need for counsel is not determined by the seriousness of the crime. The assistance of counsel will best avoid conviction of the innocent—an objective as important in the municipal court as in a court of general jurisdiction."

California's requirement extends to traffic violations. *Blake* v. *Municipal Court,* 242 Cal. App. 2d 857.

Overall, 31 States have now extended the right to defendants charged with crimes less serious than felonies. Comment, Right to Counsel, *supra,* at 134.

never limited these rights to felonies nor to lesser but serious offenses.

In *Washington* v. *Texas, supra,* we said, "We have held that due process requires that the accused have the assistance of counsel for his defense, that he be confronted with the witnesses against him, and that he have the right to a speedy and public trial." 388 U. S., at 18. Respecting the right to a speedy and public trial, the right to be informed of the nature and cause of the accusation, the right to confront and cross-examine witnesses, the right to compulsory process for obtaining witnesses, it was recently stated, "It is simply not arguable nor has any court ever held, that the trial of a petty offense may be held in secret, or without notice to the accused of the charges, or that in such cases the defendant has no right to confront his accusers or to compel the attendance of witnesses in his own behalf." Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 705 (1968).

District of Columbia v. *Clawans,* 300 U. S. 617, illustrates the point. There, the offense was engaging without a license in the business of dealing in secondhand property, an offense punishable by a fine of $300 or imprisonment for not more than 90 days. The Court held that the offense was a "petty" one and could be tried without a jury. But the conviction was reversed and a new trial ordered, because the trial court had prejudicially restricted the right of cross-examination, a right guaranteed by the Sixth Amendment.

The right to trial by jury, also guaranteed by the Sixth Amendment by reason of the Fourteenth, was limited by *Duncan* v. *Louisiana, supra,* to trials where the potential punishment was imprisonment of six months or more. But as the various opinions in *Baldwin* v. *New York,* 399 U. S. 66, make plain, the right to trial by jury has a different genealogy and is brigaded

with a system of trial to a judge alone. As stated in *Duncan:*

> "Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the complaint, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence. The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause of the Fourteenth Amendment, and must therefore be respected by the States." 391 U. S., at 156.

While there is historical support for limiting the "deep commitment" to trial by jury to "serious criminal cases," [2] there is no such support for a similar limitation on the right to assistance of counsel:

> "Originally, in England, a person charged with treason or felony was denied the aid of counsel,

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[2] See Frankfurter & Corcoran, Petty Offenses and the Constitutional Guaranty of Trial by Jury, 39 Harv. L. Rev. 917, 980–982 (1926); *James* v. *Headley*, 410 F. 2d 325, 331. Cf. Kaye, Petty Offenders Have No Peers, 26 U. Chi. L. Rev. 245 (1959).

except in respect of legal questions which the accused himself might suggest. At the same time parties in civil cases and persons accused of misdemeanors were entitled to the full assistance of counsel. . . . [It] appears that in at least twelve of the thirteen colonies the rule of the English common law, in the respect now under consideration, had been definitively rejected and the right to counsel fully recognized in all criminal prosecutions, save that in one or two instances the right was limited to capital offenses or to the more serious crimes . . . ." *Powell* v. *Alabama,* 287 U. S. 60 and 64–65.

The Sixth Amendment thus extended the right to counsel beyond its common-law dimensions. But there is nothing in the language of the Amendment, its history, or in the decisions of this Court, to indicate that it was intended to embody a retraction of the right in petty offenses wherein the common law previously did require that counsel be provided. See *James* v. *Headley,* 410 F. 2d 325, 332 n. 9.

We reject, therefore, the premise that since prosecutions for crimes punishable by imprisonment for less than six months may be tried without a jury, they may always be tried without a lawyer.

The assistance of counsel is often a requisite to the very existence of a fair trial. The Court in *Powell* v. *Alabama; supra,* 68–69—a capital case—said:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is un-

> familiar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect."

In *Gideon* v. *Wainwright, supra* (overruling *Betts* v. *Brady,* 316 U. S. 455), we dealt with a felony trial. But we did not so limit the need of the accused for a lawyer. We said:

> ". . . in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth. Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries. The right of one

charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him." 372 U. S., at 344.[3]

Both *Powell* and *Gideon* involved felonies. But their rationale has relevance to any criminal trial, where an accused is deprived of his liberty. *Powell* and *Gideon* suggest that there are certain fundamental rights applicable to all such criminal prosecutions, even those, such as *In re Oliver, supra,* where the penalty is 60 days' imprisonment:

"A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights included, as a minimum, a right to examine the witnesses against him, to offer testimony, *and to be represented by counsel.*" 333 U. S., at 273 (emphasis supplied).

The requirement of counsel may well be necessary for a fair trial even in a petty offense prosecution. We

[3] See also *Johnson* v. *Zerbst,* 304 U. S. 458, 462–463:

"[The Sixth Amendment] embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is represented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious."

are by no means convinced that legal and constitutional questions involved in a case that actually leads to imprisonment even for a brief period are any less complex than when a person can be sent off for six months or more. See, *e. g.*, *Powell* v. *Texas*, 392 U. S. 514; *Thompson* v. *Louisville*, 362 U. S. 199; *Shuttlesworth* v. *Birmingham*, 382 U. S. 87.

The trial of vagrancy cases is illustrative. While only brief sentences of imprisonment may be imposed, the cases often bristle with thorny constitutional questions. See *Papachristou* v. *Jacksonville*, 404 U. S. —.

In re Gault, 387 U. S. 1, dealt with juvenile delinquency and an offense which, if committed by an adult, would have carried a fine of $5 to $50 or imprisonment in jail for not more than two months (*id.*, at 29), but which when committed by a juvenile might lead to his detention in a state institution until he reached the age of 21. *Id.*, at 36–37. We said that "The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child "requires the guiding hand of counsel at every step in the proceedings against him," citing *Powell* v. *Alabama*, *supra*, at 69. The premise of *Gault* is that even in prosecutions for offenses less serious than felonies, a fair trial may require the presence of a lawyer.

Beyond the problem of trials and appeals is that of the guilty plea, a problem which looms large in misdemeanor as well as in felony cases. Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.

In addition, the volume of misdemeanor cases,[4] far

[4] In 1965, 314,000 defendants were charged wtih felonies in state courts, and 24,000 were charged with felonies in federal courts. President's Commission on Law Enforcement and Administration of

greater in number than felony prosecutions, may create an obsession for speedy dispositions, regardless of the fairness of the result. The Report by the President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, p. 128 (1967), states:

> "For example, until legislation last year increased the number of judges, the District of Columbia Court of General Sessions had four judges to process the preliminary stages of more than 1,500 felony cases, 7,500 serious misdemeanor cases, and 38,000 petty offenses and an equal number of traffic offenses per year. An inevitable consequence of volume that large is the almost total preoccupation in such a court with the movement of cases. The calendar is long, speed often is substituted for care, and casually arranged out-of-court compromise too often is substituted for adjudication. Inadequate attention tends to be given to the individual defendant, whether in protecting his rights, sifting the facts at trial, deciding the social risk he presents, or determining how to deal with him after conviction. The frequent result is futility and failure. As Dean Edward Barrett recently observed:
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> " 'Wherever the visitor looks at the system, he finds great numbers of defendants being processed by harassed and overworked officials. Police have more cases than they can investigate. Prosecutors walk into courtrooms to try simple cases as they take their initial looks at the files. Defense law-

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Justice, Task Force Report: The Courts 55 (1967). Exclusive of traffic offenses, however, it is estimated that there are annually between four and five million court cases involving misdemeanors. *Ibid.* And, while there are no authoritative figures, extrapolations indicate that there are probably between 40.8 and 50 million traffic offenses each year. Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1248, 1261 (1970).

> yers appear having had no more than time for hasty conversations with their clients. Judges face long calendars with the certain knowledge that their calendars tomorrow and the next day will be, if anything, longer, and so there is no choice but to dispose of the cases.
>
> " 'Suddenly it becomes clear that for most defendants in the criminal process, there is scant regard for them as individuals. They are numbers on dockets, faceless ones to be processed and sent on their way. The gap between the theory and the reality is enormous.
>
> " 'Very little such observation of the administration of criminal justice in operation is required to reach the conclusion that it suffers from basic ills.' "

That picture is seen in almost every report. "The misdemeanor trial is characterized by insufficient and frequently irresponsible preparation on the part of the defense, the prosecution, and the court. Everything is rush, rush." Hellerstein, The Importance of the Misdemeanor Case on Trial and Appeal. 38 The Legal Aid Brief Case 151, 152 (1970).

There is evidence of the prejudice which results to misdemeanor defendants from this "assembly-line justice." One study concluded that "Misdemeanants represented by attorneys are five times as likely to emerge from police court with all charges dismissed as are defendants who face similar charges without counsel." ACLU, Legal Counsel for Misdemeanants, Preliminary Report, 1 (1970).

We must conclude, therefore, that the problems associated with misdemeanor and petty [5] offenses often

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[5] 18 U. S. C. § 1 defines a petty offense as one in which the penalty does not exceed imprisonment for six months or a fine of

require the presence of counsel to insure the accused a fair trial. MR. JUSTICE POWELL suggests that these problems are raised even in situations where there is no prospect of imprisonment. *Post*, at —. We need not consider the requirements of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved, however, for here, petitioner was in fact sentenced to jail. And, as we said in *Baldwin* v. *New York*, 399 U. S., at 73: "[T]he prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or 'petty' matter and may well result

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not more than $500 or both. 18 U. S. C. § 3006A (b) provides for the appointment of counsel for indigents in all cases "other than a petty offense." But as the Fifth Circuit Court of Appeals noted in *James* v. *Headley*, 410 F. 2d 325, 330–331, 18 U. S. C. § 3006A, which was enacted as the Criminal Justice Act of 1964, contains a congressional plan for furnishing legal representation at federal expense for certain indigents and does not purport to cover the full range of constitutional rights to counsel.

Indeed, the Conference Report on the Criminal Justice Act of 1964 made clear the conferees' belief that the right to counsel extends to all offenses, petty and serious alike. Conference Report No. 1709, 88th Cong., 2d Sess., U. S. Code & Admin. News 3000, 3002–3003 (1964) (emphasis supplied).

In that connection the Federal Rules of Criminal Procedure, as amended in 1966, provide in Rule 44 (a): "Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings from his initial appearance before the commissioner or the court through appeal, unless he waives such appointment."

The Advisory Committee note on Rule 44 says: "Like the original rule the amended rule provides a right to counsel which is broader in two respects than that for which compensation is provided in the Criminal Justice Act of 1964:

"(1) The right extends to petty offenses to be tried in the district courts, and

"(2) The right extends to defendants unable to obtain counsel for reasons other than financial."

in quite serious repercussions affecting his career and his reputation." [6]

We hold, therefore, that absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial.[7]

That is the view of the Supreme Court of Oregon with which we agree. It said in *Application of Stevenson*, — Ore. —, 458 P. 2d 414, 419:

> "We hold that no person may be deprived of his liberty who has been denied the assistance of counsel as guaranteed by the Sixth Amendment. This holding is applicable to all criminal prosecutions, including prosecutions for violations of municipal ordinances. The denial of the assistance of counsel will preclude the imposition of a jail sentence." [8]

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[6] See *Marston* v. *Oliver*, — F. Supp. —, — (ED Va. 1971): "Any incarceration of over thirty days, more or less, will usually result in loss of employment, with a consonant substantial detriment to the defendant and his family."

[7] We do not share MR. JUSTICE POWELL's doubt that the Nation's legal resources are insufficient to implement the rule we announce today. It has been estimated that between 1,575 and 2,300 full-time counsel would be required to represent *all* indigent misdemeanants, excluding traffic offenders. Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1249, 1260–1261 (1970). These figures are relatively insignificant when compared to the estimated 335,200 attorneys in the United States (Statistical Abstract of the United States 153 (1971)), a number which is projected to double by the year 1985. See Ruud, That Burgeoning Law School Enrollment, 58 A. B. A. J. 146, 147. Indeed, there are 18,000 new admissions to the bar each year—3,500 more lawyers than are required to fill the "estimated 14,500 average annual openings." *Id.*, at 148.

[8] Article I, § 9, of the proposed Revised Constitution of Oregon provides:

"Every person has the right to assistance of counsel in all official proceedings and dealings with public officers that may materially

We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement. How crimes should be classified is largely a state matter.[9] The fact that traffic charges technically fall within the category of "criminal prosecutions" does not necessarily mean that many of them will be brought into the class [10] where imprisonment actually occurs.

The American Bar Association Project on Minimum Standards for Criminal Justice states:

> "As a matter of sound judicial administration it is perferable to disregard the characterization of the offense as felony, misdemeanor or traffic offense. Nor is it adequate to require the provision of defense

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affect him. If he cannot afford counsel, he has the right to have counsel appointed for him in any case in which he may lose his liberty."

[9] One partial solution to the problem of minor offenses may well be to remove them from the court system. The American Bar Association Special Committee on Crime Prevention and Control recently recommended, *inter alia*, that:

"Regulation of various types of conduct which harm no one other than those involved (*e. g.*, public drunkenness, narcotics addiction, vagrancy, and deviant sexual behavior) should be taken out of the courts. The handling of these matters should be transferred to non-judicial entities, such as detoxification centers, narcotics, treatment centers and social service agencies. The handling of other non-serious offenses, such as housing code and traffic violations, should be transferred to specialized administrative bodies."

ABA Report, New Perspectives on Urban Crime, iv (1972). Such a solution, of course, is peculiarly within the province of state and local legislatures.

[10] "Forty thousand traffic charges (arising out of 150,000 non-parking traffic citations) were disposed of by court action in Seattle during 1964. The study showed, however, that in only about 4,500 cases was there any possibility of imprisonment as the result of a traffic conviction. In only three kinds of cases was the accused exposed to any danger of imprisonment: (1) where the offense

services for all offenses which carry a sentence to jail or prison. Often, as a practical matter, such sentences are rarely if ever imposed for certain types of offenses, so that for all intents and purposes the punishment they carry is at most a fine. Thus, the standard seeks to distinguish those classes of cases in which there is real likelihood that incarceration may follow conviction from those types in which there is no such likelihood. It should be noted that the standard does not recommend a determination of the need for counsel in terms of the facts of each particular case; it draws a categorical line at those *types* of offenses for which incarceration as a punishment is a practical possibility."

Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

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charged was hit-and-run, reckless or drunken driving; or (2) where any additional traffic violation was charged against an individual subject to a suspended sentence for a previous violation; or (3) where, whatever the offense charged, the convicted individual was unable to pay the fine imposed." Junker, The Right to Counsel in Misdemeanor Cases, 43 Wash. L. Rev. 685, 711 (1968).

Of the 1,288,975 people convicted by the City of New York in 1970 for traffic infractions such as jaywalking and speeding, only 24 were fined and imprisoned, given suspended sentences, or jailed. Criminal Court of the City of New York Annual Report 11 (1970). Of the 19,187 convicted of more serious traffic offenses, such as driving under the influence, reckless driving, and leaving the scene of an accident, 404 (2.1%) were subject to some form of imprisonment. *Ibid.*

The run of misdemeanors will not be affected by today's ruling. But in those that end up in the actual deprivation of a person's liberty, the accused will receive the benefit of "the guiding hand of counsel" so necessary when one's liberty is in jeopardy.

Reversed.

SUPREME COURT OF THE UNITED STATES

No. 70-5015

Jon Richard Argersinger, Petitioner, v. Raymond Hamlin, Sheriff, Leon County, Florida. | On Writ of Certiorari to the Supreme Court of Florida.

[June 12, 1972]

MR. CHIEF JUSTICE BURGER, concurring in the result.

I agree with much of the analysis in the opinion of the Court and with MR. JUSTICE POWELL's appraisal of the problems. Were I able to confine my focus solely to the burden that the States will have to bear in providing counsel, I would be inclined, at this stage of the development of the constitutional right to counsel, to conclude that there is much to commend drawing the line at penalties in excess of six months' confinement. Yet several cogent factors suggest the infirmities in any approach that allows confinement for any period without the aid of counsel at trial; any deprivation of liberty is a serious matter. The issues that must be dealt with in a trial for a petty offense or a misdemeanor may often be simpler than those involved in a felony trial and yet be beyond the capability of a layman, especially when he is opposed by a law-trained prosecutor. There is little ground, therefore, to assume that a defendant, unaided by counsel, will be any more able adequately to defend himself against the lesser charges that may involve confinement than more serious charges. Appeal from a conviction after an uncounseled trial is not likely to be of much help to a defendant since the die is usually cast when judgment is entered on an uncounseled trial record.

Trial judges sitting in petty and misdemeanor cases—and prosecutors—should recognize exactly what will be required by today's decision. Because no individual can be imprisoned unless he is represented by counsel, the trial judge and the prosecutor will have to engage in a predictive evaluation of each case to determine whether there is a significant likelihood that, if the defendant is convicted, the trial judge will sentence him to a jail term. The judge can preserve the option of a jail sentence only by offering counsel to any defendant unable to retain counsel on his own. This need to predict will place a new load on courts already overburdened and already compelled to deal with far more cases in one day than is reasonable and proper. Yet the prediction is not one beyond the capacity of an experienced judge, aided as he should be by the prosecuting officer. As to jury cases, the latter should be prepared to inform the judge as to any prior record of the accused, the general nature of the case against the accused, including any use of violence, the severity of harm to the victim, the impact on the community and the other factors relevant to the sentencing process. Since the judge ought to have some degree of such information after judgment of guilt is determined, ways can be found in the more serious misdemeanor cases when jury trial is not waived to make it available to the judge before trial.* This will not mean a full "presentence" report on every defendant in every case before the jury passes on guilt, but a prosecutor should know before trial whether he intends to urge a jail sentence and if he does he should be prepared to aid the court with the factual and legal basis for his view on that score.

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*In a nonjury case the prior record of the accused should not be made known to the trier of fact except by way of traditional impeachment.

This will mean not only that more defense counsel must be provided, but also additional prosecutors and better facilities for securing information about the accused as it bears on the probability of a decision to confine.

The step we take today should cause no surprise to the legal profession. More than five years ago the profession, speaking through the American Bar Association in a Report on Standards Relating to Providing Defense Services, determined that the society's goal should be "that the system for providing counsel and facilities for the defense be as good as the system which society provides for the prosecution." *Id.*, at 1. The ABA was not addressing itself, as we must in this case, to the constitutional requirement but only to the broad policy issue. Elsewhere in the Report the ABA stated that

> "The fundamental premise of these standards is that representation by counsel is desirable in criminal cases both from the viewpoint of the defendant and of society." *Id.*, at 3.

After considering the same general factors involved in the issue we decide today, the ABA Report specifically concluded that

> "Counsel should be provided in all criminal proceedings for offenses punishable by loss of liberty, except those types of offenses for which such punishment is not likely to be imposed, regardless of their denomination as felonies, misdemeanors, or otherwise."

In a companion ABA Report on Standards Relating to the Prosecution Function and the Defense Function the same basic theme appears in the positive standard cast in these terms:

> "Counsel for the accused is an essential component of the administration of criminal justice. A court

> properly constituted to hear a criminal case must be viewed as a tripartite entity consisting of the judge (and a jury when appropriate), counsel for the prosecution, and counsel for the defense." *Id.*, at 153.

The right to counsel has historically been an evolving concept. The constitutional requirements with respect to the issue have dated in recent times from *Powell* v. *Alabama*, 287 U. S. 45 (1932), to *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Part of this evolution has been expressed in the policy prescriptions of the legal profession itself, and the contributions of the organized bar and individual lawyers—such as those appointed to represent the indigent defendants in the *Powell* and *Gideon* cases—have been notable. The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it.

SUPREME COURT OF THE UNITED STATES

No. 70-5015

Jon Richard Argersinger, Petitioner, *v.* Raymond Hamlin, Sheriff, Leon County, Florida. | On Writ of Certiorari to the Supreme Court of Florida.

[June 12, 1972]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE STEWART join, concurring.

I join the opinion of the Court and add only an observation upon its discussion of legal resources, *ante*, at 12, n. 7. Law students as well as practicing attorneys may provide an important source of legal representation for the indigent. The Council on Legal Education for Professional Responsibility (CLEPR) informs us that more than 125 of the country's 147 accredited law schools have established clinical programs in which faculty-supervised students aid clients in a variety of civil and criminal matters.* CLEPR Newsletter, May 1972, at 2. These programs supplement practice rules enacted in 38 States authorizing students to practice law under prescribed conditions. *Ibid.* Like the American Bar Association's Model Student Practice Rule (1969), most of these regulations permit students to make supervised court appearances as defense counsel in criminal cases. CLEPR, State Rules Permitting the Student Practice of

*A total of 57 law schools have also established clinical programs in corrections, where law students, under faculty supervision, aid prisoners in the preparation of petitions for post-conviction relief. CLEPR Newsletter, May 1972, at 3. See *United States* v. *Simpson*, 141 U. S. App. D. C. 8, 15–16, 436 F. 2d 162, 169–170 (1970).

Law: Comparisons and Comments 13 (1971). Given the huge increase in law school enrollments over the past few years, see Ruud, That Burgeoning Law School Enrollment, 58 A. B. A. J. 146 (1972), I think it plain that law students can be looked to to make a signficant contribution, quantitatively and qualitatively, to the representation of the poor in many areas, including cases reached by today's decision.

SUPREME COURT OF THE UNITED STATES

No. 70–5015

Jon Richard Argersinger, Petitioner, *v.* Raymond Hamlin, Sheriff, Leon County, Florida. | On Writ of Certiorari to the Supreme Court of Florida.

[June 12, 1972]

MR. JUSTICE POWELL, with whom MR. JUSTICE REHNQUIST joins, concurring in the result.

Gideon v. *Wainwright*, 372 U. S. 335 (1963), held that the States were required by the Due Process Clause of the Fourteenth Amendment to furnish counsel to all indigent defendants charged with felonies.[1] The question before us today is whether an indigent defendant convicted of an offense carrying a maximum punishment of six months' imprisonment or a fine of $1,000 or both, and sentenced to 90 days in jail, is entitled as a matter of constitutional right to the assistance of appointed counsel. The broader question is whether the Due Process Clause requires that an indigent charged with a state petty offense [2] be afforded the right to appointed counsel.

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[1] While it is true that Mr. Justice Black's opinion for the Court in *Gideon* is not narrowly written, Mr. Justice Harlan was quick to suggest, in his concurring opinion, that the facts in *Gideon* did not require the Court to decide whether the indigent's right to appointed counsel should extend to all criminal cases. 372 U. S., at 351. In opinions announced more recently, the Court has assumed that the holding of *Gideon* has not yet been extended to misdemeanor cases. See *In re Gault*, 387 U. S. 1, 29 (1967); *Mempa* v. *Rhay*, 389 U. S. 128, 134 (1967); *Burgett* v. *Texas*, 389 U. S. 109, 114 (1967); *Loper* v. *Beto*, — U. S. — (1972).

[2] As used herein, the term "petty offense" means any offense where the authorized imprisonment does not exceed six months, *Baldwin* v. *New York*, 399 U. S. 66, 69 (1970). It also includes all offenses

In the case under review, the Supreme Court of Florida agreed that indigents charged with serious misdemeanors were entitled to appointed counsel, but, by a vote of four to three, it limited that right to offenses punishable by more than six months' imprisonment.[3] The state court, in drawing a six-month line, followed the lead of this Court in *Duncan* v. *Louisiana*, 391 U. S. 145 (1968), and in the subsequent case of *Baldwin* v. *New York*, 399 U. S. 66 (1970), which was decided shortly after the opinion below, in which the Court held that the due process right to a trial by jury in state criminal cases was limited to cases in which the offense charged was punishable by more than six months' imprisonment. It is clear that wherever the right-to-counsel line is to be drawn, it must be drawn so that an indigent has a right to appointed counsel in all cases in which there is a due process right to a jury trial. An unskilled layman may be able to defend himself in a nonjury trial before a judge experienced in piecing together disassembled facts, but before a jury the guiding hand of counsel is needed to marshal the evidence into a coherent whole consistent with the best case on behalf of the defendant. If there is no accompanying right to counsel, the right to trial by jury becomes meaningless.

Limiting the right to jury trial to cases in which the offense charged is punishable by more than six months' imprisonment does not compel the conclusion that the indigent's right to appointed counsel must be similarly restricted. The Court's opinions in *Duncan*, *Baldwin*,

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not punishable by imprisonment, regardless of the amount of any fine that might be authorized. To this extent, the definition used herein differs from the federal statutory definition of "petty offense," which includes offenses punishable by not more than six months' imprisonment or by a fine not exceeding $500. 18 U. S. C. § 1.

[3] 236 So. 2d 442 (1970).

and *District of Columbia* v. *Clawans,* 300 U. S. 617 (1937), reveal that the jury trial limitation has historic origins at common law. No such history exists to support a similar limitation of the right to counsel; to the contrary, at common law, the right to counsel was available in misdemeanor but not in felony cases.[4] Only as recently as *Gideon* has an indigent in a state trial had a right to appointed counsel in felony cases. Moreover, the interest protected by the right to have guilt or innocence determined by a jury—tempering the possibly arbitrary and harsh exercise of prosecutorial and judicial power [5]—while important, is not as fundamental to the guarantee of a fair trial as is the right to counsel.[6]

I am unable to agree with the Supreme Court of Florida that an indigent defendant, charged with a petty offense, may in every case be afforded a fair trial without the assistance of counsel. Nor can I agree with the new rule of due process, today enunciated by the Court, that "absent a knowing and intelligent waiver, no person may be imprisoned . . . unless he was represented by counsel at his trial." *Ante,* at 12. It seems to me that the line should not be drawn with such rigidity.

There is a middle course, between the extremes of Florida's six-month rule and the Court's rule, which comports with the requirements of the Fourteenth Amendment. I would adhere to the principle of due process that requires fundamental fairness in criminal trials, a principle which I believe encompasses the right

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[4] See *Powell* v. *Alabama,* 287 U. S. 45, 60–61 (1932).

[5] *Duncan* v. *Louisiana,* 391 U. S. 145, 156 (1968).

[6] Although we have given retroactive effect to our ruling in *Gideon, Pickelsimer* v. *Wainwright,* 375 U. S. 2 (1963), we have said that, "[t]he values implemented by the right to jury trial would not measurably be served by requiring retrial of all persons convicted in the past by procedures not consistent with the Sixth Amendment right to jury trial." *De Stefano* v. *Woods,* 392 U. S. 631, 634 (1968).

to counsel in petty cases whenever the assistance of counsel is necessary to assure a fair trial.

I

I am in accord with the Court that an indigent accused's need for the assistance of counsel does not mysteriously evaporate when he is charged with an offense punishable by six months or less. In *Powell* v. *Alabama*[7] and *Gideon*,[8] both of which involved felony prosecutions, this Court noted that few laymen can present adequately their own cases, much less identify and argue relevant legal questions. Many petty offenses will also present complex legal and factual issues that may not be fairly tried if the defendant is not assisted by counsel. Even in relatively simple cases, some defendants, because of ignorance or some other handicap, will be incapable of defending themselves. The consequences of a misdemeanor conviction, whether they be a brief period served under the sometimes deplorable conditions found in local jails or the effect of a criminal record on employability, are frequently of sufficient magnitude not to be casually dismissed by the label "petty."[9]

Serious consequences also may result from convictions not punishable by imprisonment. Stigma may attach to a drunken driving conviction or a hit-and-run escapade.[10] Losing one's driver's license is more serious for some individuals than a brief stay in jail. In *Bell* v. *Burson*, 402 U. S. 535 (1970), we said:

> "Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued

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[7] *Supra*, n. 4, at 68–69.

[8] 372 U. S., at 343–345.

[9] See L. Silverstein, Defense of the Poor in Criminal Cases in American State Courts, 132 (1965).

[10] See *James* v. *Headley*, 410 F. 2d 325, 334–335 (CA5 1969).

licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment." *Id.*, at 539.

When the deprivation of property rights and interests is of sufficient consequence,[11] denying the assistance of counsel to indigents who are incapable of defending themselves is a denial of due process.

This is not to say that due process requires the appointment of counsel in all petty cases, or that assessment of the possible consequences of conviction is the sole test for the need for assistance of counsel. The flat six-month rule of the Florida court and the equally inflexible rule of the majority opinion apply to *all* cases within their defined areas regardless of circumstances. It is precisely because of this mechanistic application that I find these alternatives unsatisfactory. Due process, perhaps the most fundamental concept in our law, embodies principles of fairness rather than immutable line-drawing as to every aspect of a criminal trial. While counsel is often essential to a fair trial, this is by no

[11] A wide range of civil disabilities may result from misdemeanor convictions, such as forfeiture of public office (*State* v. *Kruger*, 280 Mo. 293, 217 S. W. 310 (1919)), disqualification for a licensed profession (Cal. Bus. & Prof. Code § 3094 (West 1962) (optometrists); N. C. Gen. Stat. § 93 A–4 (b) (1965) (real estate brokers)), and loss of pension rights, Fla. Stat. Ann. § 185.18 (3) (West 1966) (police disability pension denied when injury is result of participation in fights, riots, civil insurrections, or while committing crime); Burns Ind. Ann. Stat. § 28–5414 (1948) (teacher convicted of misdemeanor resulting in imprisonment); 53 Purdon Pa. Stat. Ann. §§ 39323, 65599 (1957) (conviction of crime or misdemeanor)). See generally Project, The Collateral Consequences of a Criminal Conviction, 23 Vand. L. Rev. 929 (1970).

means a universal fact. Some petty offense cases are complex; others are exceedingly simple. As a justification for furnishing counsel to indigents accused of felonies, this Court noted, "That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the widespread belief that lawyers in criminal courts are necessities, not luxuries." [12] Yet government often does not hire lawyers to prosecute petty offenses; instead the arresting police officer presents the case. Nor does every defendant who can afford to do so hire lawyers to defend petty charges. Where the possibility of a jail sentence is remote and the probable fine seems small, or where the evidence of guilt is overwhelming, the costs of assistance of counsel may exceed the benefits.[13] It is anomalous that the Court's opinion today will extend the right of appointed counsel to indigent defendants in cases where the right to counsel would rarely be exercised by nonindigent defendants.

Indeed, one of the effects of this ruling will be to favor defendants classified as indigents over those not so classified yet who are in low income groups where engaging counsel in a minor petty offense case would be a luxury the family could not afford. The line between indigency and assumed capacity to pay for counsel is necessarily somewhat arbitrary, drawn differently from State to State and often resulting in serious inequities to accused persons. The Court's new rule will accent the disadvantage of being barely self-sufficient economically.

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[12] *Gideon* v. *Wainwright*, 372 U. S., at 344.

[13] In petty offenses, there is much less plea negotiation than in serious offenses. See Report by the President's Commission on Law Enforcement and the Administration of Justice, The Challenge of Crime in a Free Society, 134 (1967) (hereinafter cited as "Challenge"). Thus, in cases where the evidence of guilt is overwhelming, the assistance of counsel is less essential to obtain a lighter sentence.

A survey of state courts in which misdemeanors are tried showed that procedures were often informal, presided over by lay judges. Jury trials were rare, and the prosecution was not vigorous.[14] It is as inaccurate to say that no defendant can obtain a fair trial without the assistance of counsel in such courts as it is to say that no defendant needs the assistance of counsel if the offense charged is only a petty one.[15]

Despite its overbreadth, the easiest solution would be a prophylactic rule that would require the appointment of counsel to indigents in all criminal cases. The simplicity of such a rule is appealing because it could be applied automatically in every case, but the price of pursuing this easy course could be high indeed in terms of its adverse impact on the administration of the criminal justice systems of 50 States. This is apparent when one reflects on the wide variety of petty or misdemeanor offenses, the varying definitions thereof, and the diversity of penalties prescribed. The potential impact on state court systems is also apparent in view of the variations in types of courts and their jurisdictions, ranging from justices of the peace and part-time judges in the small communities to the elaborately staffed police courts which operate 24 hours a day in the great metropolitan centers.

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[14] Silverstein, *supra*, n. 9, at 125–126.

[15] Neither the Report by the President's Commission on Law Enforcement and the Administration of Justice nor the American Bar Association went the route the Court takes today. The President's Commission recommended that counsel be provided to criminal defendants who face "a significant penalty" and at least to those who are in danger of "substantial loss of liberty." Challenge, *supra*, n. 13, at 150. The American Bar Association standard would not extend the right to counsel to cases where "loss of liberty" is not "likely to be imposed." American Bar Association Project on Minimum Standards for Criminal Justice, Providing Defense Services, 37–40 (1968). Neither supports a new, inflexible constitutional rule.

The rule adopted today does not go all the way. It is limited to petty offense cases in which the sentence is some imprisonment. The thrust of the Court's position indicates, however, that when the decision must be made, the rule will be extended to all petty offense cases except perhaps the most minor traffic violations. If the Court rejects on constitutional grounds, as it has today, the exercise of any judicial discretion as to need for counsel if a jail sentence is imposed, one must assume a similar rejection of discretion in other petty offense cases. It would be illogical—and without discernible support in the Constitution—to hold that no discretion may ever be exercised where a nominal jail sentence is contemplated and at the same time endorse the legitimacy of discretion in "non-jail" petty offense cases which may result in far more serious consequences than a few hours or days of incarceration.

The Fifth and Fourteenth Amendments guarantee that property, as well as life and liberty, may not be taken from a person without affording him due process of law. The majority opinion suggests no constitutional basis for distinguishing between deprivations of liberty and property. In fact, the majority suggests no reason at all for drawing this distinction. The logic it advances for extending the right to counsel to all cases in which the penalty of any imprisonment is imposed applies equally well to cases in which other penalties may be imposed. Nor does the majority deny that some "non-jail" penalties are more serious than brief jail sentences.

Thus, although the new rule is extended today only to the imprisonment category of cases, the Court's opinion foreshadows the adoption of a broad prophylactic rule applicable to all petty offenses. No one can foresee the consequences of such a drastic enlargement of the constitutional right to free counsel. But even today's decision could have a seriously adverse impact

upon the day to day functioning of the criminal justice system. We should be slow to fashion a new constitutional rule with consequences of such unknown dimensions, especially since it is supported neither by history nor precedent.

II

The majority opinion concludes that, absent a valid waiver, a person may not be imprisoned even for lesser offenses unless he was represented by counsel at the trial. In simplest terms this means that under no circumstances, in any court in the land, may anyone be imprisoned—however briefly—unless he was represented by or waived his right to counsel. The opinion is disquietingly barren of details as to how this rule will be implemented.

There are thousands of statutes and ordinances which authorize imprisonment for six months or less, usually as an alternative to a fine. These offenses include some of the most trivial of misdemeanors, ranging from spitting on the sidewalk to certain traffic offenses. They also include a variety of *more serious misdemeanors.* This broad spectrum of petty offense cases daily floods the lower criminal courts. The rule laid down today will confront the judges of each of these courts with an awkward dilemma. If counsel is not appointed or knowingly waived, no sentence of imprisonment for any duration may be imposed. The judge will therefore be forced to decide in advance of trial—and without hearing the evidence—whether he will forgo entirely his judicial discretion to impose some sentence of imprisonment and abandon his responsibility to consider the full range of punishments established by the legislature. His alternatives, assuming the availability of counsel, will be to appoint counsel and retain the discretion vested in him by law, or to abandon this discretion in advance and proceed without counsel.

If the latter course is followed, the first victim of the new rule is likely to be the concept that justice requires a personalized decision both as to guilt and the sentence. The notion that sentencing should be tailored to fit the crime and the individual would have to be abandoned in many categories of offenses. In resolving the dilemma as to how to administer the new rule, judges will be tempted arbitrarily to divide petty offenses into two categories—those for which sentences of imprisonment may be imposed and those in which no such sentence will be given regardless of the statutory authorization. In creating categories of offenses which by law are imprisonable but for which he would not impose jail sentences, a judge will be overruling *de facto* the legislative determination as to the appropriate range of punishment for the particular offense. It is true, as the majority notes, that there are some classes of imprisonable offenses for which imprisonment is rarely imposed. But even in these, the occasional imposition of such a sentence may serve a valuable deterrent purpose. At least the legislatures, and until today the courts, have viewed the threat of imprisonment—even when rarely carried out—as serving a legitimate social function.

In the brief for the United States as *amicus curiae*, the Solicitor General suggested that some flexibility could be preserved through the technique of trial *de novo* if the evidence—contrary to pretrial assumptions—justified a jail sentence. Presumably a mistrial would be declared, counsel appointed, and a new trial ordered. But the Solicitor General also recognized that a second trial, even with counsel, might be unfair if the prosecutor could make use of evidence which came out at the first trial when the accused was uncounselled. If the second trial were held before the same judge, he

might no longer be open-minded. Finally, a second trial held for no other reason than to afford the judge an opportunity to impose a harsher sentence might run afoul of the guarantee against being twice placed in jeopardy for the same offense.[16] In all likelihood, there will be no second trial and certain offenses classified by legislatures as imprisonable, will be treated by judges as unimprisonable.

The new rule announced today also could result in equal protection problems. There may well be an unfair and unequal treatment of individual defendants depending on whether the individual judge has determined in advance to leave open the option of imprisonment. Thus, an accused indigent would be entitled in some courts to counsel while in other courts in the same jurisdiction an indigent accused of the same offense would have no counsel. Since the services of counsel may be essential to a fair trial even in cases in which no jail sentence is imposed, the results of this type of pretrial judgment could be arbitrary and discriminatory.

A different type of discrimination could result in the typical petty offense case where judgment in the alternative is prescribed: for example, "five days in jail or $100 fine." If a judge has predetermined that no imprisonment will be imposed with respect to a particular category of cases, the indigent who is convicted will often receive no meaningful sentence. The defendant who can pay a $100 fine, and does so, will have responded to the sentence in accordance with law, whereas the indigent who commits the identical offense may pay no penalty. Nor would there be any deterrent against the repetition of similar offenses by indigents.[17]

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[16] See *Callan* v. *Wilson*, 127 U. S. 540 (1880); *North Carolina* v. *Pearce*, 395 U. S. 711 (1969).

[17] The type of penalty discussed above (involving the discretionary alternative of "jail or fine") presents serious problems of fairness—

To avoid these equal protection problems and to preserve a range of sentencing options as prescribed by law, most judges are likely to appoint counsel for indigents in all but the most minor offenses where jail sentences are extremely rare. It is doubtful that the States possess the necessary resources to meet this sudden expansion of the right to counsel. The Solicitor General, who suggested on behalf of the United States the rule the Court today adopts, recognized that the consequences could be far reaching. In addition to the expense of compensating counsel, he noted that the mandatory requirement of defense counsel will "require more pre-trial time of prosecutors, more courtroom time, and this will lead to bigger backlogs with present personnel. Court reporters will be needed as well as counsel, and they are one of our worst bottlenecks." [18]

After emphasizing that the new constitutional rule should not be made retroactive, the Solicitor General commented on the "chaos" which could result from any mandatory requirement of counsel in misdemeanor cases:

> "[I]f . . . this Court's decision should become fully applicable on the day it is announced, there could be a massive pileup in the state courts which do not now meet this standard. This would involve delays and frustrations which would not be a real contribution to the administration of justice." [19]

The degree of the Solicitor General's concern is reflected by his admittedly unique suggestion regard-

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both to indigents and nonindigents and to the administration of justice. Cf. *Tate* v. *Short*, 401 U. S. 395 (1971). No adequate resolution of these inherently difficult problems has yet been found. The rule adopted by the Court today, depriving the lower courts of all discretion in such cases unless counsel is available and is appointed, could aggravate the problem.

[18] Tr. of Oral Arg., at 34–35.

[19] *Id.*, at 36–37.

ing the extraordinary demand for counsel which would result from the new rule. Recognizing implicitly that, in many sections of the country, there simply will not be enough lawyers available to meet this demand either in the short or long term, the Solicitor General speculated whether "clergymen, social workers, probation officers, and other persons of that type" could be used "as counsel in certain types of cases involving relatively small sentences." [20] Quite apart from the practical and political problem of amending the laws of each of the 50 States which require a license to practice law, it is difficult to square this suggestion with the meaning of the term "assistance of counsel" long recognized in our law.

The majority's treatment of the consequences of the new rule which so concerned the Solicitor General is not reassuring. In a footnote, it is said that there are presently 335,200 attorneys and that the number will increase rapidly, doubling by 1985. This is asserted to be sufficient to provide the number of full-time counsel, estimated by one source at between 1,575 and 2,300, to represent all indigent misdemeanants, excluding traffic offenders. It is totally unrealistic to imply that 335,200 lawyers are potentially available. Thousands of these are not in practice, and many of those who do practice work for governments, corporate legal departments, the Armed Services and are unavailable for criminal representation. Of those in general practice, we have no indication how many are qualified to defend criminal cases or willing to accept assignments which may prove less than lucrative for most.[21]

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[20] *Id.*, at 39.

[21] The custom in many, if not most, localities is to appoint counsel on a case-by-case basis. Compensation is generally inadequate. Even in the federal courts under the Criminal Justice Act of 1964, 18 U. S. C. § 3006A, which provides one of the most generous compensation plans, the rates for appointed counsel—$20 per hour spent

It is similarly unrealistic to suggest that implementation of the Court's new rule will require no more than 1,575 to 2,300 "full-time" lawyers. In few communities are there full-time public defenders available for or private lawyers specializing in petty cases. Thus, if it were possible at all, it would be necessary to coordinate the schedules of those lawyers who are willing to take an occasional misdemeanor appointment with the crowded calendars of lower courts in which cases are not scheduled weeks in advance but instead are frequently tried the day after arrest. Finally, the majority's focus on aggregate figures ignores the heart of the problem, which is the distribution and availability of lawyers, especially in the hundreds of small localities across the country.

Perhaps the most serious potential impact of today's holding will be on our already overburdened local courts.[22] The primary cause of "assembly line" justice is a volume of cases far in excess of the capacity

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out of court, $30 per hour of court time, subject to a maximum total fee of $400 for a misdemeanor case and $1,000 for a felony—are low by American standards. Consequently, the majority of persons willing to accept appointments are the young and inexperienced. See Cappelletti, Part One: The Emergence of a Modern Theme, in Cappelletti and Gordley, Legal Aid: Modern Themes and Variations, 24 Stanford L. Rev. 347, 377–378 (1972). MR. JUSTICE BRENNAN suggests, in his concurring opinion, that law students might provide an important source of legal representation. He presents no figures, however, as to how many students would be qualified and willing to undertake the responsibilities of defending indigent misdemeanants. Although welcome progress is being made with programs, supported by the American Bar Association, to enlist the involvement of law students in indigent representation, the problems of meeting state requirements and of assuring the requisite control and supervision, are far from insubstantial. Moreover, the impact of student participation would be limited primarily to the 140 or less communities where these law schools are located.

[22] See generally H. James, Crisis in the Courts, c. 2 (1967); Challenge, *supra*, n. 13, 145–156.

of the system to handle efficiently and fairly. The Court's rule may well exacerbate delay and congestion in these courts. We are familiar with the common tactic of counsel of exhausting every possible legal avenue, often without due regard to its probable payoff. In some cases this may be the lawyer's duty; in other cases it will be done for purposes of delay.[23] The absence of direct economic impact on the client, plus the omnipresent ineffective assistance of counsel claim, frequently produces a decision to litigate every issue. It is likely that young lawyers, fresh out of law school, will receive most of the appointments in petty offense cases. The admirable zeal of these lawyers; their eagerness to make a reputation; the time their not-yet crowded schedules permit them to devote to relatively minor legal problems; their desire for courtroom exposure; the availability in some cases of hourly fees, lucrative to the novice; and the recent constitutional explosion in procedural rights for the accused—all these factors are likely to result in the stretching out of the process with consequent increased costs to the public and added delay and congestion in the courts.[24]

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[23] See, *e. g.*, James, *supra*, n. 21, at 27–30; Schrag, On Her Majesty's Secret Service: Protecting the Consumer in New York City, 80 Yale L. J. 1529 (1971).

[24] In Cook County, Illinois, a recent study revealed that the members of the Chicago Bar Association's Committee on the Defense of Prisoners, who are appointed to represent indigent defendants, elect a jury trial in 63% of their trial cases, while retained and appointed counsel do so in 33% and the public defender in only 15%. "One possible explanation for this contrast is that committee counsel, who are sometimes serving in part to gain experience, are more willing to undertake a jury trial than is an assistant public defender, who is very busy and very conscious of the probable extra penalty accruing to a defendant who loses his case before a jury." D. Oaks and W. Lehman, A Criminal Justice System and the Indigent, 158 (1968) (footnote omitted).

There is an additional problem. The ability of various States and localities to furnish counsel varies widely. Even if there were adequate resources on a national basis, the uneven distribution of these resources—of lawyers, of facilities and available funding—presents the most acute problem. A number of state courts have considered the question before the Court in this case, and have been compelled to confront these realities. Many have concluded that the indigent's right to appointed counsel does not extend to all misdemeanor cases. In reaching this conclusion, the state courts have drawn the right-to-counsel line in different places, and most have acknowledged that they were moved to do so, at least in part, by the impracticality of going further.[25] In other States, legislatures and courts through the enactment of laws or rules have drawn the line short of that adopted by the majority.[26] These cases and statutes reflect the judgment of the courts and legislatures of many States, who understand the problems of local judicial systems better than this Court, that

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[25] See *Irvin* v. *State*, 44 Ala. App. 101, 203 So. 2d 283 (1967); *Burrage* v. *Superior Court*, 105 Ariz. 53, 459 P. 2d 313 (1969); *Cableton* v. *State*, 243 Ark. 351, 420 S. W. 2d 535 (1967); *Argersinger* v. *Hamlin*, 236 So. 2d 442 (Fla. 1970); *People* v. *Dupree*, 42 Ill. 2d 249, 246 N. E. 2d 281 (1969); *People* v. *Mallory*, 378 Mich. 538, 147 N. W. 2d 66 (1967); *Hendrix* v. *City of Seattle*, 76 Wash. 2d 142, 456 P. 2d 696, cert. denied, 397 U. S. 948 (1969); *State ex rel. Plutshack* v. *Department of Health and Social Services*, 37 Wis. 2d 713, 155 N. W. 2d 549 (1968).

[26] See Hawaii St. Const., Art. I, § 11 (1968); Idaho Code Ann. §§ 19–851, 19–852 (1971 Supp); Kan. Gen. Stat. Ann. § 22–4503 (1970 Supp.); Ky. Crim. Proc. Rule 8.04; La. Rev. Stat., 15–141 (F) (West 1967); Me. Rule Crim. Proc. 44; Md. R. 719 §b2 (a); Neb. Rev. Stat. § 29–1803 (1967); Nev. Rev. Stat. §§ 171.188, 193.140 (1969); N. Mex. Stat. Ann. § 40–2017 (1970 Supp.); Utah Code Ann. § 77–64–2 (1971 Supp.); Vt. Stat. Ann., Tit. 13, § 6503 (1971 Supp.); Va. Code Ann. § 19.1–241.1 (1971 Supp).

the rule announced by the Court today may seriously overtax capabilities.[27]

The papers filed in a recent petition to this Court for a writ of certiorari serve as an example of what today's ruling will mean in some localities. In November 1971 the petition in *Wright* v. *Town of Wood,* No. 71–5722, was filed with this Court. The case, arising out of a South Dakota police magistrate court conviction for the municipal offense of public intoxication, raises the same issues before us in this case. The Court requested that the town of Wood file a response. On March 8, 1972, a lawyer occasionally employed by the town filed with the clerk an affidavit explaining why the town had not responded. He explained that Wood, South Dakota, has a population of 132, that it has no sewer or water system and is quite poor, that the office of the nearest lawyer is in a town 40 miles away, and that the town had decided that contesting this case would be an unwise allocation of its limited resources.

Though undoubtedly smaller than most, Wood is not dissimilar from hundreds of communities in the United States with no or very few lawyers, with meager financial resources, but with the need to have some sort of local court system to deal with minor offenses.[28] It is

[27] See Kamisar & Choper, The Right to Counsel in Minnesota: Some Field Findings and Legal-Policy Observations, 48 Minn. L. Rev. 1, 68 (1963). Local judges interviewed by the authors concluded that the right to counsel should not be extended to petty cases. "If no such dividing line can be drawn, if the question of assigned counsel in misdemeanor cases resolves itself into an 'all or nothing' proposition, then, the thrust of their views was that limited funds and lawyer-manpower and the need for judicial economy dictate that it be 'nothing.'" (Footnote omitted.) But see *State* v. *Borst,* 278 Minn. 388, 154 N. W. 2d 888 (1967).

[28] See *Cableton* v. *State, supra,* n. 24, at 358: "[T]here are more justices of the peace in Arkansas than there are resident practicing lawyers and . . . there are counties in which there are no

quite common for the more numerous petty offenses in such towns to be tried by local courts or magistrates while the more serious offenses are tried in a county-wide court located in the county seat.[29] It is undoubtedly true that some injustices result from the informal procedures of these local courts when counsel is not furnished; certainly counsel should be furnished to some indigents in some cases. But to require that counsel be furnished virtually every indigent charged with an imprisonable offense would be a practical impossibility for many small town courts. The community could simply not enforce its own laws.[30]

Perhaps it will be said that I give undue weight both to the likelihood of short term "chaos" and to the possibility of long term adverse effects on the system. The answer may be given that if the Constitution requires the rule announced by the majority, the conse-

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practicing lawyers. The impact of [right to counsel in misdemeanor cases] would seriously impair the administration of justice in Arkansas and impose an intolerable burden upon the legal profession." (Footnote omitted.)

[29] See Silverstein, *supra*, n. 9, at 125–126.

[30] The successful implementation of the majority's rule would require state and local governments to appropriate considerable funds, something they have not been willing to do. Three States with 21% of the Nation's population provide more than 50% of all state appropriations for indigent defense. Note, Dollars and Sense of an Expanded Right to Counsel, 55 Iowa L. Rev. 1249, 1265 (1970). For example, in 1971 the State of Kansas spent $570,000 defending indigents in felony cases—up from $376,000 in 1969. Although the budgetary request for 1972 was $612,000, the legislature has appropriated only $400,000. Brief for Appellant in *James* v. *Strange*, No. 71–11. "In view of American resources the funds spent on the legal services program can only be regarded as trivial." Cappelletti, *supra*, n. 21, at 379. "Although the American economy is over 8 times the size of the British and the American population is almost 4 times as great, American legal aid expenditures are less than 2 times as high." *Id.*, at 379, n. 210.

quences are immaterial. If I were satisfied that the guarantee of due process required the assistance of counsel in every case in which a jail sentence is imposed or that the only workable method of insuring justice is to adopt the majority's rule, I would not hesitate to join the Court's opinion despite my misgivings as to its effect upon the administration of justice. But in addition to the resulting problems of availability of counsel, of costs, and especially of intolerable delay in an already overburdened system, the majority's drawing of a new inflexible rule may raise more Fourteenth Amendment problems than it resolves. Although the Court's opinion does not deal explicitly with any sentence other than deprivation of liberty however brief, the according of special constitutional status to cases where such a sentence is imposed may derogate the need for counsel in other types of cases, unless the Court embraces an even broader prophylactic rule. Due process requires a fair trial in all cases. Neither the six-month rule approved below nor the rule today enunciated by the Court is likely to achieve this result.

III

I would hold that the right to counsel in petty offense cases is not absolute but is one to be determined by the trial courts exercising a judicial discretion on a case-by-case basis.[31] The determination should be made before the accused formally pleads; many petty cases are resolved by guilty pleas in which the assistance of counsel may be required.[32] If

[31] It seems to me that such an individualized rule, unlike a six-month rule and the majority's rule, does not present equal protection problems under this Court's decisions in *Griffin* v. *Illinois*, 351 U. S. 12 (1956); *Douglas* v. *California*, 372 U. S. 353 (1963); and *Mayer* v. *City of Chicago*, 404 U. S. 189 (1971).

[32] See, *e. g.*, Katz, Municipal Courts—Another Urban Ill, 20 Case Western Reserve L. Rev. 87, 92–96 (1968). Cf. *Hamilton* v. *Ala-*

the trial court should conclude that the assistance of counsel is not required in any case, it should state its reasons so that the issue could be preserved for review. The trial court would then become obligated to scrutinize carefully the subsequent proceedings for the protection of the defendant. If an unrepresented defendant sought to enter a plea of guilty, the Court should examine the case against him to insure that there is admissible evidence tending to support the elements of the offense. If a case went to trial without defense counsel, the court should intervene, when necessary, to insure that the defendant adequately brings out the facts in his favor and to prevent legal issues from being overlooked. Formal trial rules should not be applied strictly against unrepresented defendants. Finally, appellate courts should carefully scrutinize all decisions not to appoint counsel and the proceedings which follow.

It is impossible, as well as unwise, to create a precise and detailed set of guidelines for judges to follow in determining whether the appointment of counsel is necessary to assure a fair trial. Certainly three general factors should be weighed. First, the court should consider the complexity of the offense charged. For example, charges of traffic law infractions would rarely present complex legal or factual questions, but charges that contain difficult intent elements or which raise collateral legal questions, such as search and seizure problems, would usually be too complex for an unassisted layman. If the offense were one where the State is represented by counsel and where most defendants who can afford to do so obtain counsel,

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bama, 368 U. S. 52 (1961); *White* v. *Maryland*, 373 U. S. 59 (1963); *Harvey* v. *Mississippi*, 340 F. 2d 263 (CA5 1965).

Although there is less plea negotiating in petty cases, see n. 13, *supra*, the assistance of counsel may still be needed so that the defendant who is not faced with overwhelming evidence of guilt can make an intelligent decision whether to go to trial.

there would be a strong indication that the indigent also needs the assistance of counsel.

Second, the court should consider the probable sentence that will follow if a conviction is obtained. The more serious the likely consequences, the greater is the probability that a lawyer should be appointed. As noted in Part I above, imprisonment is not the only serious consequence the court should consider.

Third, the court should consider the individual factors peculiar to each case. These, of course, would be the most difficult to anticipate. One relevant factor would be the competency of the individual defendant to present his own case. The attitude of the community toward a particular defendant or particular incident would be another consideration. But there might be other reasons why a defendant would have a peculiar need for a lawyer which would compel the appointment of counsel in a case where the court would normally think this unnecessary. Obviously, the sensitivity and diligence of individual judges would be crucial to the operation of a rule of fundamental fairness requiring the consideration of the varying factors in each case.

Such a rule is similar in certain respects to the special circumstances rule applied to felony cases in *Betts* v. v. *Brady,* 316 U. S. 455 (1942), and *Bute* v. *Illinois,* 333 U. S. 640 (1948), which this Court overruled in *Gideon.*[33] One of the reasons for seeking a more definitive standard in felony cases was the failure of many state courts to live up to their responsibilities in determining on a case-by-case basis whether counsel should be appointed. See the concurring opinion of Mr. Justice Harlan in *Gideon,* 372 U. S., at 350-351. But this Court should not assume

[33] I do not disagree with the overruling of *Betts;* I am in complete accord with *Gideon. Betts,* like *Gideon,* concerned the right to counsel in a felony case. See n. 1, *supra.* Neither case controls today's result.

that the past insensitivity of some state courts to the rights of defendants will continue. Certainly if the Court follows the course of reading rigid rules into the Constitution, so that the state courts will be unable to exercise judicial discretion within the limits of fundamental fairness, there is little reason to think that insensitivity will abate.

In concluding, I emphasize my long held conviction that the adversary system functions best and most fairly only when all parties are represented by competent counsel. Before becoming a member of this Court, I participated in efforts to enlarge and extend the availability of counsel. The correct disposition of this case, therefore, has been a matter of considerable concern to me—as it has to the other members of the Court. We are all strongly drawn to the ideal of extending the right to counsel, but I differ as to two fundamentals: (i) what the Constitution *requires*, and (ii) the effect upon the criminal justice system, especially in the smaller cities and the thousands of police, municipal and justice of the peace courts across the country.

The view I have expressed in this opinion would accord considerable discretion to the courts, and would allow the flexibility and opportunity for adjustment which seems so necessary when we are imposing new doctrine on the lowest level of courts of 50 States. Although this view would not precipitate the "chaos" predicted by the Solicitor General as the probable result of the Court's absolutist rule, there would still remain serious practical problems resulting from the expansion of indigents' rights to counsel in petty offense cases.[34] But the according of review-

[34] Indeed, it is recognized that many of the problems identified in this opinion will result from any raising of the standards as to the requirement of counsel. It is my view that relying upon judicial discretion to assure fair trial of petty offenses not only comports with the Constitution but will minimize problems which otherwise

able discretion to the courts in determining when counsel is necessary for a fair trial, rather than mandating a completely inflexible rule, would facilitate an orderly transition to a far wider availability and use of defense counsel.

In this process, the courts of first instance which decide these cases would have to recognize a duty to consider the need for counsel in every case where the defendant faces a significant penalty. The factors mentioned above, and such standards or guidelines to assure fairness as might be prescribed in each jurisdiction by legislation or rule of court, should be considered where relevant. The goal should be, in accord with the essence of the adversary system, to expand as rapidly as practicable the availability of counsel so that no person accused of crime must stand alone if counsel is needed.

As the proceedings in the courts below were not in accord with the views expressed above, I concur in the result of the decision in this case.

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could affect adversely the administration of criminal justice in the very courts which already are under the most severe strain.